

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOGISTICARE SOLUTION, LLC,)
)
 Petitioner,)
)
vs.) Case No. 06-2393BID
)
COMMISSION FOR THE)
TRANSPORTATION DISADVANTAGED,)
)
 Respondent,)
)
and)
)
TRANSPORTATION MANAGEMENT)
SERVICES OF BREVARD, INC.,)
)
 Intervenor.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Daniel M. Kilbride, the designated Administrative Law Judge of the Division of Administrative Hearings, on July 27 and 28, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Geoffrey D. Smith, Esquire
 Timothy B. Elliot, Esquire
 Smith and Associates
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 Tallahassee, Florida 32308

For Respondent: Jeffrey D. Jones, Esquire
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For Intervenor: E.A. "Seth" Mills, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner's substantial interests are at issue in this proceeding; whether Respondent's decision to award a contract to Intervenor was clearly erroneous, arbitrary, capricious, illegal, dishonest, or contrary to competition; whether Petitioner brought this protest for an improper purpose; whether Intervenor should be awarded its attorney's fees for Petitioner's violation of Section 57.105, Florida Statutes (2005).

PRELIMINARY STATEMENT

This is an administrative proceeding involving a public procurement protest filed by Logisticare Solutions, L.L.C. ("Petitioner" or "Logisticare") as it relates to the decision of the Commission for the Transportation Disadvantaged ("Respondent" or "Commission") to award a contract to Transportation Management Services of Brevard, Inc. ("TMSB" or

"Intervenor") to provide Non-Emergency Transportation ("NET") services to Medicaid recipients in Broward County.

Respondent is administratively housed within the Florida Department of Transportation ("FDOT"). Respondent, through the FDOT, issued a formal Request for Proposals ("RFP") for the coordination of Medicaid NET Services provided to Medicaid Beneficiaries in Broward County. Intervenor and Petitioner were among the four bidders that submitted proposals in response to the RFP.

On May 26, 2006, after an evaluation committee graded the proposals, FDOT posted its Notice of Intent to award a contract for Broward County to TMSB. Petitioner submitted its Notice of Intent to Protest and filed its Petition for Formal Administrative Hearing on June 9, 2006. On June 30, 2006, TMSB filed a Motion to Dismiss. The Commission referred the matter to the Division of Administrative Hearings on July 7, 2006, and discovery followed. The undersigned Administrative Law Judge (ALJ) granted TMSB's Motion to Intervene and denied Intervenor's Motion to Dismiss by Order, dated July 21, 2006.

At the final hearing, the parties stipulated to the admission of Joint Exhibits 1 through 18. Petitioner presented the testimony of Henry Hardy, Byron Underwood, Lisa Bacot, and Robert Cornell in its case-in-chief. Petitioner's Exhibits 1 through 5, 8, 11 through 13 and 15 were admitted into evidence

as part of Petitioner's case-in-chief. Petitioner's Exhibits 6, 7 and 9 were admitted subject to the ALJ's rulings on pending objections. Petitioner's Exhibit 10 was admitted after the ALJ granted Intervenor's objection striking select portions of the deposition testimony.

During the testimony of Henry Hardy, Logisticare's corporate representative, TMSB raised several objections as to relevance and improper lay witness opinion concerning whom the lay witness believed should be awarded the contract, or how he would have scored the proposals. Ruling was reserved and TMSB was granted a continuing objection throughout the testimony. The objection is sustained and the testimony is stricken.

§ 90.401, Fla. Stat. (2005)¹; Zabner v. Howard Johnson's, Inc., 227 So. 2d 543 (Fla. 4th DCA 1969) (Plaintiff's history of litigiousness was not relevant; it did not have a tendency to prove or disprove a given proposition that was material as was shown by the pleadings).

TMSB objected to Petitioner's Exhibit 6 on the grounds of relevance. The objection is sustained and the exhibit is not admitted. § 90.401-402, Fla. Stat.; § 90.701, Fla. Stat.; Fino v. Nodine, 646 So. 2d 746, 748-749 (Fla. 4th DCA 1994) ("[A]cceptable lay opinion testimony typically involves matters such as distance, time, size, weight, form and identity.").

TMSB objected to select portions of Petitioner's Exhibit 7 on the grounds of relevance, improper lay witness testimony offering opinions on how the proposals should have been scored and improper expert testimony about a topic that is not a recognized field of expertise. The objections are sustained and the testimony is excluded. § 90.401-402, Fla. Stat.; § 90.701, Fla. Stat.; Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Feller v. State, 637 So. 2d 911 (Fla. 1994) (Reversible error for an expert to state her opinion that victim was telling the truth and had not fabricated her story that she had been sexually abused.); Fino, Zabner, supra.

TMSB objected to select portions of Petitioner's Exhibit 9 on the grounds of relevance and improper lay witness testimony. The objections are sustained and the testimony is excluded. § 90.401-402, Fla. Stat.; Fino, supra. Zabner, supra. § 90.701, Fla. Stat.

Respondent and Intervenor presented no oral testimony, or exhibits during their cases-in-chief.

A Transcript of the hearing was filed on August 7, 2006, and Petitioner and Intervenor timely filed Proposed Recommended Orders, which have been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is an independent commission of the State of Florida, created pursuant to Section 427.012, Florida Statutes, and housed administratively and fiscally within the Florida Department of Transportation ("FDOT"). Respondent's address is 605 Suwannee Street, MS-49, Tallahassee, Florida 32399-0450.

2. The stated purpose of the Commission is "to accomplish the coordination of transportation services provided to the transportation disadvantaged."

3. Section 427.013, Florida Statutes, provides for a coordinated system of transportation under which the Commission serves as the coordinating and policy-setting body that oversees the provision of services to the transportation disadvantaged throughout the state.

4. The Commissioners appoint an executive director who serves "under the direction, supervision and control of the Commission." § 427.012(6), Fla. Stat.

5. Under the coordinated system, local Metropolitan Planning Organizations (MPOs) established under federal law for transportation planning purposes, nominate a "Community Transportation Coordinator" ("CTC"), which may be a public body such as the county commission, or may be a not-for-profit, or for-profit transportation provider. The CTC is charged with the

statutory duty to provide or arrange to provide transportation to the disadvantaged.

6. In many counties in the state, the approved CTC is the county commission. In Broward County, the CTC is the county government.

7. The Agency for Health Care Administration ("AHCA") was one of the state agencies that was a voting member on the Commission until legislative changes were made in 2006, and AHCA is now an ex officio member of the Commission. AHCA is the state Medicaid agency and provides the largest source of funds for the provision of transportation disadvantaged services under the state's Medicaid Non-Emergency Transportation ("Medicaid NET") program that is funded through a combination of state and federal dollars.

8. As the state Medicaid agency, AHCA receives annual appropriations to provide transportation services for health care-related purposes to eligible Medicaid recipients. Historically, AHCA has purchased these services through the "coordinated system" administered by the Commission, pursuant to Chapter 427, Florida Statutes.

9. In addition to actual transportation in vehicles such as buses, vans, taxi cabs, ambulances, or other means, the Medicaid NET services include "gate keeping" responsibilities to determine eligible riders, routing, and scheduling requirements,

record keeping and reporting, complaint handling, resolution and reporting, and overall management of the system of transportation.

10. In 2003, AHCA, concerned with controlling Medicaid costs, began to explore ways in which it could reduce the amount it pays for transportation services by using "capitated" arrangements under which a provider would be paid a lump sum amount to provide all such transportation services for all Medicaid eligible riders.

11. In 2003, AHCA issued an RFP seeking to select a single statewide provider for Medicaid NET services. Logisticare and other transportation providers submitted proposals, as did the Commission.

12. The Commission negotiated with AHCA to withdraw its RFP, and enter into a contract that would allow the Commission to act as the statewide provider. AHCA agreed with the Commission and withdrew its RFP. AHCA then entered into a contract directly with the Commission, allowing the Commission to subcontract the Medicaid NET responsibilities to the local CTCs, and if the CTC did not accept responsibility for providing Medicaid NET services within the available funding amount then a private provider would be selected under a competitive procurement process.

13. In the majority of counties in the state, the local CTC has agreed to provide services as the Medicaid NET provider under capitated agreements. However, in a small number of counties, the CTC refused to provide services under the proposed funding formula for a capitated or lump sum contract.

14. In Brevard, Hillsborough, Manatee, Broward, and Duval counties, the CTC did not agree to accept responsibility for Medicaid NET services. In each of those counties, an RFP process was utilized to select a Medicaid NET provider.

15. In Broward County, an RFP was issued in January 2005, and the preliminary award was made to Logisticare. However, as a result of a protest filed by Transportation Management Services of Broward, Inc. (an affiliate of Petitioner), a Recommended Order and Final Order was entered rejecting all proposals and requiring a new RFP.

16. The Commission created an internal subcommittee to modify its procurement procedures and incorporate the ALJ's comments contained in the Recommended Order.

17. After revising its procedures, the Commission again requested written proposals from qualified Proposers to provide Medicaid NET Services to Medicaid beneficiaries in Broward County.

18. AHCA reviewed, provided input to, and approved the provisions of the Respondent's current Request for Proposals.

19. The FDOT assisted the Commission administratively in obtaining the Medicaid NET services described in the RFP.

20. The notice of solicitation was issued in April 2006, with addenda issued on April 18, 21, May 3, 8 and 10, 2006. Responses were due on May 16, 2006.

21. In each of the prior RFPs for Medicaid NET services in various counties, local experience of the proposer was an evaluation criterion, and this criterion was adopted into the initial RFP at issue in this proceeding. TMSB requested during the Question and Answer period that the local experience requirement be removed, but the Commission responded that it could not be removed.

22. TMSB then filed a Notice of Protest, seeking removal of the evaluation criteria for local experience. The TMSB protest was settled based upon a teleconference call between Executive Director Lisa Bacot, Byron Underwood (Respondent's Medicaid NET project manager), and Jeffrey Jones, counsel for the Commission. No notice was provided to Logisticare, or any other registered vendors that a protest had been filed, or that there was a meeting to settle the protest, nor were any minutes of this meeting kept.

23. The elimination of the local experience evaluation criteria was incorporated in Addendum No. 5 to the RFP which was

issued on May 8, eight days prior to the proposal submission deadline.

24. When the notice of solicitation and all addenda were posted, no party filed a protest within 72 hours.

25. TMSB, Logisticare, First Transit, Inc. ("First Transit") and Hannah's Care, LLC submitted bids in response to the RFP.

26. An Evaluation Committee was selected by the Respondent's Medicaid Committee to evaluate and score proposals. The evaluators included Lisa Bacot, executive director to the Commission; Karen Somerset, assistant executive director; and Vera Sharitt, a member of the Broward County local coordinating board for transportation disadvantaged services.

27. The RFP specified individual evaluation criteria that were divided into three categories with points for each category including executive summary (10 points), Management Plan (60 points) and Technical Plan (30 points), for a total of 100 possible points. There was no weighting of the individual evaluation criteria in each broad category identified in the RFP, or on the evaluator score sheets disclosed in the RFP.

28. The evaluation committee members scored the proposals as follows:

	Logisticare	TMSB	First Transit	Hannah's Care
Lisa Bacot	92	94	87	3
Karen Somerset	83	88	75	20
Vera Sharitt	56	77	88	5

29. The proposals were ranked as follows: TMSB (86.32 points); First Transit (83.33 points); LogistiCare (76.99 points); and Hannah's Care (13.32 points). Based on the scoring of the proposals, the Commission posted its Notice of Intent to award the contract for Broward County to TMSB on May 26, 2006. The TMSB and First Transit BIDS are Responsive

30. The RFP included language informing bidders that the stated price listed in the RFP could change due to Florida's ongoing efforts to reform Medicaid.

31. The RFP also included a provision allowing the selected provider to terminate the contract, without cause, after providing 30 days notice.

32. Despite First Transit's proposal language indicating it would abide by the terms of the contract, Logisticare alleged that First Transit's proposal included language reserving the right to negotiate the price, if necessary. Petitioner alleged that this language made First Transit's bid non-responsive.

33. This allegation is not correct. If faced with actual price reductions, it was not improper for First Transit to seek

to negotiate with the Commission in order to attempt to reduce the impact of any future price fluctuations.

34. Logisticare alleged that TMSB's proposal did not comply with the RFP requirement to provide "documentation demonstrating the number of Medicaid NET trips provided on a monthly basis and show the complaint ratios on said trips."

35. TMSB's proposal provided complaint ratio data for the month of March 2006, as well as other more general complaint ratio data. This is sufficient for compliance.

36. In their proposals, both Logisticare and TMSB claimed credit for the corporate experience of their predecessors and affiliates.

37. Both FDOT and the Commission found the four bidder's proposals to be responsive.

The Evaluators Were Not Shown to be Biased for One Bidder over Another

38. When structuring the evaluation committee that would be responsible for scoring the bidder's proposals, the Commission directed the executive director and assistant executive director to serve as evaluators. The Commission also required a local representative from Broward County to serve as an evaluator.

39. All of the evaluators signed Conflict of Interest forms confirming there was no present conflict with their service as evaluators.

40. An evaluator had the ability to recuse herself if she believed a conflict of interest existed with any of the bidders.

41. None of the evaluators recused themselves from serving as evaluators.

42. Through their positions on the Commission staff, Bacot and Somerset had opportunities to interact socially with other individuals involved in the NET industry, including Commissioners, private providers, and other industry representatives. Bacot and Somerset each have professional relationships with other individuals involved in the NET services industry, including the principals, consultants, and employees of TMSB and Logisticare. The social interactions between Bacot and Somerset and the principals, consultants, and employees of TMSB and Logisticare were always in group settings that occurred in conjunction with Commission events and activities. Bacot and Somerset did not independently meet with or visit any of the bidder's principals for reasons other than Commission business.

43. The evidence did not demonstrate any improper conduct by Bacot and/or Somerset in the implementation of this bidding process.

44. Petitioner did not demonstrate that the evaluations conducted by Bacot and Somerset were influenced by their professional relationships with any of the bidders' principals or employees.

45. The evidence is insufficient to support any allegations of bias.

46. The differences between the scores that Bacot and Somerset assigned to TMBS and Logisticare in this evaluation were extremely slight. Bacot scored TMSB two points higher than Logisticare and Somerset scored TMSB higher by only five points.

47. Local coordinating boards supervise the availability and quality of NET services in each county. Vera Sharitt is a member of the Broward County Local Coordinating Board and was selected by the Board to serve as an evaluator for this procurement.

48. Sharitt has a long history of involvement with the NET service industry in Broward County. She gained experience and familiarity with the individuals and entities involved with the provision of NET services in Broward County.

49. Sharitt and Karen Caputo, owner of AAA Wheelchair Wagon Service, Inc., serve together on the Broward County Local Coordinating Board.

50. There is no evidence in the record demonstrating any type of business, legal, or financial relationship between Sharitt and Caputo.

51. Sharitt's involvement with the local coordinating board allowed her to observe Logisticare's quality of service and gain knowledge of some user's public dissatisfaction with Logisticare's performance under the fee-for-service contract in Broward County.

52. The evidence did not indicate that Sharitt's evaluation of Logisticare's proposal was based on any other factors other than her personal judgment and experience, which included her knowledge regarding Logisticare's operations in Broward.

53. There was no reliable evidence to support the assertion that Sharitt's evaluation of the Logisticare proposal was influenced by Sharitt's professional relationship with Caputo.

54. Petitioner did not prove that Sharitt showed any bias favoring TMBS while evaluating and scoring the proposals.

55. The evaluators considered the evaluation criteria found in the RFP's evaluation summary sheet to determine the proposal's scores.

56. The evaluators did not apply or weigh the scoring criteria differently than how it was described on the score sheet.

57. The evaluators assigned a greater number of points when a proposal more thoroughly explained a concept and assigned fewer points when a proposal did not adequately address an RFP requirement.

58. Each evaluator's total score reflected her independent assessment of the bidder's ability to provide the services requested in the RFP.

59. Sharitt scored First Transit as the best proposal.

TMSB's Proposal Did Not Create a Conflict of Interest

60. Since its creation, the Commission has entered into various types of contracts with individuals (or their employers) who have simultaneously served as Commissioners. In fact, the Florida Statutes, in effect at the time this bid process was initiated, expressly required that some sitting Commissioners be under contract with the Commission.

61. The RFP included a conflict of interest provision subjecting the procurement to Chapter 112, Florida Statutes, and requiring the disclosure of all state employees that own 5 percent or more of the bidder, or who also serve as officers, directors, employees, or other agents of the bidder.

62. David McDonald owns less than 5 percent of TMSB, the bidding entity, and is employed as TMSB's executive operations manager and was appointed to serve as a volunteer commissioner in September or October of 2005.

63. David McDonald owns 20 percent of a separate corporate entity, TMS of Florida, Inc., that has an agreement with TMSB to share resources, but is otherwise not a legal affiliate, parent, subsidiary, or in any other way related to TMSB.

64. While serving as a volunteer commissioner, David McDonald was not a state employee.

65. David McDonald's dual roles as a TMSB employee and a volunteer Commissioner were disclosed in the TMSB proposal.

66. David McDonald provided input into TMSB's preparation of its proposal. However, David McDonald was not involved in the drafting of the RFP, in the evaluation of the bidder's proposals, or in the award of the proposed contract at issue in this case.

67. There is no evidence to indicate that David McDonald used his position as a Commissioner to influence the evaluators, or the evaluation process.

68. Other than providing input to TMSB's proposal, David McDonald's involvement with the RFP process was limited to one e-mail he sent to the FDOT contact person listed in the RFP,

Lillian Graham, requesting clarification of an answer the Commission provided to one of TMSB's written questions.

69. Section 427.012, Florida Statutes, was extensively rewritten after the proposed award of this contract, during the 2006 legislative session, and the entire Commission structure was revised.

70. David McDonald voluntarily served as a Commissioner. He ceased filling this position when the Governor signed the legislation on May 31, 2006.

Logisticare's Untimely Challenge of the RFP's Specifications

71. Logisticare's protest included several allegations challenging the RFP's specifications and provisions, including the following:

- a. Whether price was properly considered under this RFP;
- b. Whether it was proper to delete language from the evaluation score sheet, via addenda, describing a bidder's past experience providing NET services in Broward County;
- c. Whether it was proper to use a Request for Proposal format to conduct this procurement;
- d. Whether there was a lack of clarity in the RFP's description of its software requirements;
- e. Whether the RFP was required to include a method for weighting each sub-evaluation factor;

f. Whether the RFP should have included a provision automatically prohibiting bidders with employees, or principals currently serving as Commissioners from submitting proposals in response to the RFP.

72. In regard to allegations in paragraph 74a, the RFP provided a set price that was only subject to change based upon the actions of the Legislature, or other outside agencies in their exercise of control of the state's budget, and it is not contrary to Florida law when the RFP offers a set price for the sought-after services.

73. In regard to allegations in paragraph 74b, the Commission stated that it removed from the score sheet the criterion specifically describing local county experience in order to level the playing field and to preclude a bidder from unfairly receiving extra points. There was no evidence to show otherwise.

74. As to the allegations in paragraph 71c through 71f, Petitioner did not protest any of the RFP's terms, or provisions until after the evaluation process was completed, which resulted in its being ranked as the third-highest bidder.

75. A challenge to the terms and specifications of an RFP must be filed within 72 hours of notice of the posting of the RFP. There were no challenges filed to the terms and specifications of this RFP.

CONCLUSIONS OF LAW

76. 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.

Burden of Proof

77. Subsection 120.57(3)(f), Florida Statutes, 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

78. The protestor has the burden of providing 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. See § 120.57 (1)(j), Fla. Stat. ("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.")

79. 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 Subsection 120.57(1), Florida Statutes, 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 607, 609 (Fla. 1st DCA 1998).

80. As outlined in Subsection 120.57(3)(f), Florida Statutes, 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 J.G. Van Laningham 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 statute, 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 34.

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

82. 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.

83. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves

consideration of "whether the agency: (1) has considered all relevant factors; (2) had given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enterprises v. Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co., Inc. v. State Department of Transportation, 602 So. 2d 632, 634 n. 3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." The court in Dravo also observed this "is usually a fact-intensive determination." Id. at 634.

84. An agency is given wide discretion in soliciting and accepting competitive bids and proposals. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988)²; Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). In Tropabest Foods, Inc. v. State of Florida, Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986), the court found that an agency has the discretion to waive an irregularity in a bid when

the irregularity is not material, that is, when it does not give the bidder "a substantial advantage over the other bidders."

85. 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, 723-724 (Fla. 1938), where it explained that:

[T]he 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.

86. 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.

87. 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).

Logisticare Lacks Standing

88. To bring a protest, a party is required to show that its substantial interest will be affected by the proposed agency action or proceedings. § 120.52(12)(b), Fla. Stat. (defining a "party" as one "whose substantial interest will be affected by proposed agency action"); Fla. Admin. Code R. 28-106.101 (2005) (governing administrative proceedings when the substantial interests of a party are determined by the agency).

89. As the third-ranked bidder, Logisticare can only demonstrate it has standing if it proves that the proposals submitted by TMSB and First Transit are non-responsive, and, thus, neither of the higher-ranked bidders are proper awardees.

Preston Carroll Company, Inc. v. Florida Keys Aqueduct Authority, 400 So. 2d 524 (Fla. 3d DCA 1981) (holding that third-ranked bidder was unable to demonstrate it was substantially affected by intended award of a contract, and,

thus, lacked standing to bring protest); Hemophilia Health Services, Inc. v. Agency for Health Care Administration, Case No. 05-2804BID, at para. 81 (DOAH December 2, 2005) (rejecting lower-tiered bidder's protest and concluding "[i]n order to establish the required substantial interest for standing, a protestor must demonstrate that, but for the agency's error, the protestor would have been a winner"); Metcalf & Eddy, Inc. v. Dep't of Transportation, Case No. 00-0494BID (DOAH July 30, 2001)(third-ranked bidder able to withstand a motion to dismiss by alleging that its substantial interests would be affected by proposed agency action after specifically alleging that the two higher ranked bidder's proposals were non-responsive); Enabling Technologies Company v. Dep't of Labor and Employment Security, Case No. 96-3265BID (DOAH September 11, 1996) (concluding a bidder who is ineligible to be awarded the contract at issue does not have standing to protest the award).

90. Before a party can be considered to have a substantial interest in the outcome of a proceeding, it must show:

(1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing under Chapter 120, Florida Statutes, and (2) that its substantial interest is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury; the second

deals with the nature of the injury. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981) (establishing the two-prong test for determining if a party had standing); Ybor III, Ltd. v. Florida Housing Finance Corp., 843 So. 2d 344 (Fla. 1st DCA 2003) (applying the Agrico test to determine a party did have standing to request a formal administrative hearing).

91. Logisticare, as the third-ranked bidder, must prove but for the agency's errors it would have won the competition. Metcalf & Eddy, Inc. v. Dep't of Transportation, Case No. 00-0494BID (DOAH July 30, 2001).

92. On the basis of the findings of fact herein, Petitioner has not proven by a preponderance of evidence that the Commission's decision to accept the proposals of all four bidders as responsive was contrary to its governing statutes, rules or policies, or the provisions of the RFP, or that its decision was clearly erroneous, contrary to competition, arbitrary, or capricious.

93. By failing to demonstrate that the higher-ranked proposals were non-responsive, Logisticare failed to establish that, but for the Commission's errors, it would be the winner. By failing to establish its right to the contract, Logisticare failed to establish that its substantial interests would be affected by the proposed agency action. Because Logisticare's

substantial interests will not be affected by the proposed agency action, Logisticare lacks standing to bring this protest, and its Petition should be dismissed. Exterior Assessments, LLC v. Dep't of Business and Professional Regulation, Case No. 03-1722BID, para. 56-58 (DOAH August 22, 2003) (holding that third-ranked bidder did not meet its burden to show that it should have received the award over the higher-ranked bidders, and, thus, failed to prove its standing to challenge the award). TMSB and First Transit Proposals are Responsive

94. A "responsive bid," "responsive proposal," or "responsive reply" means a bid, or proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation. A "responsive vendor" means a vendor that has submitted a bid, proposal, or reply "that conforms in all material respects to the solicitation." § 287.012(24) and (25), Fla. Stat.

95. The RFP is the governing document containing the criteria with which a responsive proposal must comply. The Commission determined that the TMSB, Logisticare and First Transit proposals complied with the RFP's requirements and were responsive.

96. Under Florida law, an "[ALJ] need not, in effect, second guess the members of the evaluation committee to determine whether he and/or other reasonable and well-informed

persons might have reached a contrary result. Rather a 'public body has wide discretion' in the bidding process and 'its decision, when based on an honest exercise' of the discretion, should not be overturned 'even if it may appear erroneous and even if reasonable persons may disagree.' The [ALJ's] sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly."

Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

97. After reviewing the bidder's proposals and the relevant testimony, there is reasonable and credible evidence in the record to support the Commission's determination of responsiveness.

98. Logisticare failed to demonstrate that the TMSB or First Transit proposals were non-responsive for failing to materially conform to the RFP's requirements. Therefore, the Commission's decision to name TMSB as the intended awardee of the proposed contract is not clearly erroneous, arbitrary, capricious or contrary to competition.

99. On the basis of the foregoing findings of fact, and for the reasons discussed above, it is concluded that the proposals submitted by TMSB and First Transit are responsive in all material respects.

100. Evaluators are selected specifically for their knowledge and expertise within a specified field or industry. Evaluators are not required to be blank slates, but must apply their knowledge and expertise, including their familiarity with other people and entities operating in the industry, to successfully accomplish their duties. Old Tampa Bay Enterprises, Inc. v. Dep't of Transportation, Case No. 98-5225BID, para. 158-162 (DOAH May 27, 1999); Experior Assessments, LLC v. Dep't of Business and Professional Regulation, Case No. 03-1722BID, para. 77-79 (DOAH August 22, 2003)(declaring "[i]f evaluation committee members are required to be experienced and knowledgeable, they must be allowed to rely on that experience and knowledge in evaluating proposals."); Morall & Carey v. Dep't of Revenue, Case No. 95-3029BID, para. 47-52 (DOAH August 31, 1995) (holding "the pre-existing relationship between the evaluators and Intervenor did not transform the honest exercise of the evaluator's discretion into an arbitrary, fraudulent, dishonest, or illegal exercise of agency discretion."); Gibbons & Company, Inc. v. Florida Board of Regents, Case No. 99-0697BID, para. 205, 281 (DOAH September 17, 1999) ("It would make little or no sense to require the members of the evaluation committee to be experienced and knowledgeable . . . and then, once they have been appointed to the committee, to forbid them, in discharging

their duties as evaluators, from relying on the experience and knowledge that qualified them to serve on the committee").

101. In Old Tampa Bay, the ALJ dismissed claims of bias arising from an evaluator's alleged preference for the winning bidder. According to the ALJ, it was reasonable to conclude the evaluator's familiarity with the "nuts and bolts" of the operations that made his opinions more reliable. This familiarity included experience with the services being sought and some of the individuals identified in the various proposals. An evaluator is "not required to put on blinders or disregard his own first-hand knowledge of the operations . . . and of the people who have worked on them." Old Tampa Bay Enterprises, Inc. v. Dep't of Transportation, Case No 98-5225BID, para. 158-162 (DOAH May 27, 1999).

102. Based on the principles stated in Wester and Old Tampa, Petitioner failed to prove that any of the evaluators were biased for or against any bidder. Evaluators are not expected to disregard the very knowledge and experience that qualifies them to conduct an evaluation. Moreover, a finding of bias "must be based upon 'hard facts,' not mere 'suspicion or innuendo.'" Barton Protective Services, LLC v. Dep't of Transportation, Case No. 06-1541BID, para. 213 (DOAH July 20, 2006) (citing CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1581-82 (Fed. Cir. 1983) and Filtration Development Co.,

LLC v. United States, 60 Fed. Cl. 371, 380 (Fed. Cl. 2004).

Logisticare's reliance on innuendo and opinion does not demonstrate that the evaluators were unable to fairly evaluate the TMSB or Logisticare proposals.

103. Logisticare failed to establish with persuasive evidence that the evaluators' scores were not based on a fair and honest judgment of how well the proposal met the RFP's evaluation criteria. The evaluators were shown to have relied on their experience and knowledge in comparing the proposals against the RFP. If evaluation committee members are required to be experienced and knowledgeable, they must be allowed to rely on that experience and knowledge in evaluating proposals.

104. In fact, Logisticare admitted that other reasonable or plausible explanations, not involving bias, exist to explain the evaluators scoring of the proposals. Therefore, this tribunal can readily conclude that Logisticare failed to carry its burden of proof to demonstrate bias. See Colbert, 890 So. 2d at 1166; Dravo, 602 So. 2d at 635.

105. Furthermore, it is well-settled that "a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency." Intercontinental Properties, Inc. v. Dep't of

Health and Rehabilitative Services, 606 So. 2d 380, 384 (Fla. 3d DCA 1992).

106. At hearing, Logisticare also raised the issue of the evaluators giving unearned points based on the experience of TMSB's affiliates. Logisticare failed to establish the extent of the credit given on this basis or whether it would have impacted the resulting award to TMSB. Moreover, Logisticare waived the issue because its proposal also claimed credit for experience earned by a different (predecessor) entity. Logisticare cannot allege wrongdoing on the part of the Commission and TMSB when it, too, suffers from the same deficiency.

107. It appears that the evaluators followed the scoring methodology outlined in the RFP. Unlike the previous procurement effort, where the evaluators jointly developed their own weighting scheme outside of the RFP's published guidelines, this procurement's evaluations were conducted according to the terms of the score sheets provided to the bidders. The evaluators did not alter or exceed the scoring methodology described in the RFP. The evaluators are allowed, even required, to apply their own personal expertise to the completion of their duties, and Logisticare did not challenge or protest the evaluation plan until after it had lost the competition.

108. Ultimately, Logisticare's attempts to demonstrate arbitrary and erroneous scoring or some level of bias by the evaluators, either for TMBS or against Logisticare, fell short of its burden or proof.

Conflict of Interest

109. The RFP included the state of Florida's standard form PUR 1001, General Instructions to Respondents. This form includes a prohibition against "conflicts of interest" and requires a bidder to disclose all state employees that are also "officers, directors, employees, or other agents," as well as state employees that own 5 percent or more of the bidding entity.

110. The Florida Statutes define a "conflict of interest" as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." § 112.312(8), Fla. Stat.

111. The wording of Section 427.012, Florida Statutes, in effect at the time of the issuance of the RFP, expressly required the Commission to include at least six private for profit and/or non-profit providers with a minimum of five years of continuous experience in the NET services industry. The statute also required the Commission to include a representative of the community transportation coordinators ("CTCs"), entities

from each county that were individually under contract with the Commission.

112. One consequence of the now-revised statute's commission staffing requirement was that the Commission had a history of filling its seats with individuals, or employees of entities, that simultaneously contracted with the Commission. Both statutory language and historical practice confirm that no conflict of interest was created when a sitting Commissioner or his employer bid on a proposal. This is a reasonable conclusion after recognizing that the Legislature specifically required the Commission to include representatives from the private sector and the CTCs. To conclude otherwise would contradict the statute's express requirement and penalize the private providers who volunteered to represent segments of an industry that is largely funded by contracts with governmental entities. In essence, Logisticare argues the very nature that qualifies these private providers for service as a Commissioner would then disqualify them from bidding on the work that is their livelihood. This is an illogical conclusion.

113. "The conflict of interest theory is based, as we understand it, on the fact that an individual occupying a public position uses the trust imposed in him and the position he occupies to further his own personal gain. It is the influence he exerts in his official position to gain personally in spite

of his official trust which is the evil the law seeks to eradicate." City of Coral Gables v. Weksler, 164 So. 2d 260, 263 (Fla. 3d DCA 1964).

114. In Weksler, the District Court of Appeal held that there was no conflict of interest in the contractual relationship between a city and one of its employees, whereby the employee would manage a golf course and return a percentage of the revenue to the city. After reviewing the facts and the applicable law, the court concluded that the employee did not act in an official capacity to personally gain a direct or indirect benefit. While the employee had acted on his own behalf, he took no official action on behalf of the city. Weksler, 164 So. 2d at 263.

115. As in Weksler, McDonald took no official action on behalf of the Commission regarding the award to TMSB. Moreover, there is no evidence in the record demonstrating that McDonald used his position as a voluntary Commissioner to influence the procurement process for personal gain or to help TMSB obtain the contract.

116. In this case, it is unnecessary to decide what would qualify as a true conflict of interest under Chapter 112, Florida Statutes. David McDonald's roles as a commissioner and a TMSB employee were disclosed in the TMSB proposal. Moreover, McDonald's voluntary service as a Commissioner legally

terminated on May 31, 2006, when the Governor signed into law the legislation revising the Commission's structure. Chapter 2006-61, Laws of Florida (2006).³

117. During the time he served as a commissioner, David McDonald was an employee of TMSB, not the state, and, possessing less than four percent of the shares, did not own a material interest in the company. § 112.312(15), Fla. Stat. (defining "material interest" as "direct or indirect ownership of more than 5 percent of the total assets or capital stock of any business entity").

118. Furthermore, McDonald took no official action as a Commissioner regarding the procurement. He was not involved in the development of the RFP or the evaluation of the proposals or TMSB's selection as the winning bidder.

119. McDonald's role in the process was limited to providing input to the TMSB proposal and contracting the FDOT point of contact to request clarification of the Commission's answer to one of TMSB's written questions.

120. Therefore, it is concluded that no conflict of interest arose from David McDonald's roles as a voluntary Commissioner and a TMSB employee.

Logisticare's Untimely Challenge of RFP Specifications

121. When challenging an RFP's specifications, Section 120.57(3)(b), Florida Statutes requires the following:

With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation.

122. When a bidder fails to timely challenge a procurement document's specifications, it waives its right to do so, and is prohibited from raising any such issue during a later protest. Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731 (Fla. 1st DCA 2004)(affirming Department's final order rejecting untimely protest of RFP's specifications); Optiplan, Inc. v. School Bd. of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998)(bidder waived right to challenge School Board's stated evaluation criteria by failing to bring protest within 72 hours of publication of bid solicitation); Capeletti Brothers, Inc. v. Dep't. of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986)(holding bidder waived right to protest bid solicitation specifications when it failed to bring challenge within 72 hours of receipt of project plans).

123. In this case, Logisticare raised numerous challenges to the RFP's specifications and requirements, but only in the formal bid protest.

124. Logisticare's challenge to the RFP's price terms was untimely. Commission witnesses testified that the price was fixed and only subject to change based on Legislative funding decisions. The price offered in the RFP was not subject to the Commission's discretion. If Logisticare wished to challenge the RFP's price terms, it was required to do so within 72 hours of the RFP being published, and not only after being ranked as the third-highest bidder.

125. It is concluded that the RFP's price terms were not contrary to Florida law.

126. Logisticare also challenged the propriety of the Commission's decision to delete from the evaluation sheet the language concerning a bidder's experience in Broward County. Logisticare admits that it received this information through an addendum, and it only raised the issue after losing the competition to both TMSB and First Transit. Again, Logisticare's protest was brought after the statutory deadline had expired, and the issue was waived.

127. This same conclusion applies to Logisticare's protests concerning the Commission's use of a Request for Proposals format over another procurement method, the alleged lack of clarity in the RFP's description of its software requirement, the RFP's scoring methodology and the alleged failure to include in the RFP a provision limiting the pool of

bidders to those entities without owners or employees currently serving as Commissioners. Logisticare was required to raise these allegations within 72 hours of the RFP's issuance; however, it failed to do so. Therefore, it is concluded that Logisticare's protests of various RFP specifications was untimely and waived under Florida Law. § 120.57(3), Fla. Stat.

Intervenor's Motions Alleging Petitioner Filed this Protest for Improper Purpose and Seeking Sanctions

128. Under Section 120.595, Florida Statutes, a protest brought for an "improper purpose" is one that is frivolous or without a justiciable issue of fact or law. Consultech of Jacksonville v. Dep't of Health, 876 So. 2d 731, 736 (Fla. 1st DCA 2004)(holding an appeal is frivolous under the statute if it presents "no justiciable question and is so devoid of merit on the face of the record that there is little prospect it will ever succeed.'). Summer Place Condo Assoc. v. Brenda Steiner, Case No. 05-1924F (DOAH July 15, 2005)(defining "improper purpose" as one that is frivolous or without justiciable issue of fact or law).

129. Under Subsection 57.105(1), Florida Statutes, an award of attorney's fees is required after a finding that "the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial (a) [w]as not supported by the

material facts necessary to establish the claim or defense; or (b) [w]ould not be supported by the application of then-existing law to those material facts." Subsection 57.105(5), Florida Statutes, expressly applies this same standard to administrative proceedings.

130. Although Logisticare failed to carry its burden of proof in this case, it is not clear that Logisticare knew, or should have known, that its protest was not supported by material facts or existing law. Therefore, this tribunal does not conclude that Logisticare brought this protest for an improper purpose, and Intervenor's motion for sanctions under Section 57.105, Florida Statutes, is denied.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

RECOMMENDED that the Commission enter a final order adopting this Recommended Order, dismissing Logisticare's protest, and awarding the contract to TMSB.

DONE AND ENTERED this 29th day of September, 2006, in
Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2006.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes shall be to the 2005 Version.

2/ Although the ruling of the court in Groves-Watkins that an agency's decision "to award or reject all bids" may be overturned only if the agency acted "fraudulently, arbitrarily, illegally, or dishonestly" has been limited in Section 120.57(3)(f), Florida Statutes, to an agency's decision to reject all bids, there is nothing in the statute to indicate that the Legislature intended to change the degree of deference given to agency decisions to award a contract pursuant to the competitive procurement process.

3/ Chapter 2006-61, Laws of Florida (2006), reads as follows:

CHAPTER 2006-61
House Bill No. 487

An act relating to the Commission for the Transportation Disadvantaged; amending s. 427.012, F.S.; revising the membership of the commission; establishing term limits; directing each member of the commission to serve without regional bias; providing qualifications for appointment to membership on the commission; providing for nonvoting advisory members; requiring candidates for appointment to the commission to meet certain standards for background screening; requiring the Department of Transportation to inform the commission if a candidate fails to meet the screening standards; providing that costs of screening be borne by the department or the candidate for appointment; authorizing the commission to appoint technical working groups; providing for membership of the working groups; amending s. 427.013, F.S.; requiring the commission to develop a transportation fund allocation methodology for certain purposes; specifying methodology criteria; preserving Agency for Health Care Administration authority to distribute Medicaid funds; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 427.012, Florida Statutes, is amended to read:

427.012 The Commission for the Transportation Disadvantaged.—There is created the Commission for the Transportation Disadvantaged in the Department of Transportation.

(1) The commission shall consist of seven members, all of whom shall be appointed by the Governor, in accordance with the requirements of s. 20.052.

(a) Five of the members must have significant experience in the operation of a business and it is the intent of the Legislature that, when making an appointment, the Governor select persons who reflect the broad diversity of the business community in this state, as well as the racial, ethnic, geographical, and gender diversity of the population of this state.

(b) Two of the members must have a disability and use the transportation disadvantaged system.

(c) Each member shall represent the needs of the transportation disadvantaged throughout the state. A member may not subordinate the needs of the transportation disadvantaged in general in order to favor the needs of others residing in a specific location in the state.

(d) Each member shall be appointed to a term of 4 years. A member may be reappointed for one additional 4-year term.

(e) Each member must be a resident of the state and a registered voter.

(f) At any given time, at least one member must be at least 65 years of age.

(g) The Secretary of Transportation, the Secretary of Children and Family Services, the director of Workforce Innovation, the executive director of the Department of Veterans' Affairs, the Secretary of Elderly Affairs, the Secretary of Health Care Administration, the director of the Agency for Persons with Disabilities, and a county manager or administrator who is appointed by the Governor, or a senior-management-level representative of each, shall serve as ex officio, nonvoting advisors to the commission.

(h) A member may not, within the 5 years immediately before his or her appointment, or during his or her term on the commission, have or have had a financial relationship with, or represent or have represented as a lobbyist as defined in s. 11.045, the following:

1. A transportation operator;
 2. A community transportation coordinator;
 3. A metropolitan planning organization;
 4. A designated official planning agency;
 5. A purchaser agency;
 6. A local coordinating board;
 7. A broker of transportation; or
 8. A provider of transportation services.
- ~~the following members:~~

~~(a) The secretary of the Department of Transportation or the secretary's designee.~~

~~(b) The secretary of the Department of Children and Family Services or the secretary's designee.~~

~~(c) The Commissioner of Education or the commissioner's designee.~~

~~(d) The director of the Agency for Workforce Innovation or the director's designee.~~

~~(e) The executive director of the Department of Veterans' Affairs or the executive director's designee.~~

~~(f) The secretary of the Department of Elderly Affairs or the secretary's designee.~~

~~(g) The director of the Agency for Health Care Administration or the director's designee.~~

~~(h) A representative of the Florida Association for Community Action,~~

~~who shall serve at the pleasure of that association.~~

~~(i) A representative of the Florida Transit Association, who shall serve at the pleasure of that association.~~

~~(j) A person over the age of 60 who is a member of a recognized statewide organization representing elderly Floridians. Such person shall be appointed by the Governor to represent elderly Floridians and shall be appointed to serve a term of 4 years.~~

~~(k) A handicapped person who is a member of a recognized statewide organization representing handicapped Floridians. Such person shall be appointed by the Governor to represent handicapped Floridians and shall be appointed to serve a term of 4 years.~~

~~(l) Two citizen advocate representatives who shall be appointed by the Governor for a term of 4 years, one representing rural citizens and one representing urban citizens.~~

~~(m) A representative of the community transportation coordinators. Such person shall be appointed by the Governor to represent all community transportation coordinators and shall be appointed to serve a term of 4 years.~~

~~(n) One member of the Early Childhood Council. Such person shall be appointed by the Governor to represent maternal and child health care providers and shall be appointed to serve a term of 4 years.~~

~~(o) Two representatives of current private for-profit or private not-for-profit transportation operators each of which have a minimum of 5 years of continuous experience operating a broad based system of~~

~~ambulatory and wheelchair/stretchers type transportation, utilizing not less than 50 vehicles and including dispatch and scheduling responsibilities. Such persons shall be appointed by the Commissioner of Agriculture to serve a term of 4 years.~~

~~(p) Four representatives of current private for-profit or private not-for-profit transportation operators, each of which having a minimum of 5 years of continuous experience operating a broad-based system of ambulatory and wheelchair or stretchers type transportation, utilizing not less than 50 vehicles, and including dispatch and scheduling responsibilities. Such persons shall be appointed by the Commissioner of Agriculture to serve a term of 4 years.~~

~~(q) Six citizens representing the nontransportation business community of the state, three members appointed by the President of the Senate and three members appointed by the Speaker of the House of Representatives.~~

(2) The chairperson shall be appointed by the Governor and the vice chairperson of the commission shall be elected annually from the membership of the commission.

(3) Members of the commission shall serve without compensation but shall be allowed per diem and travel expenses, as provided in s. 112.061.

(4) The commission shall meet at least quarterly, or more frequently at the call of the chairperson. Five ~~Nine~~ members of the commission constitute a quorum, and a majority vote of the members present is necessary for any action taken by the commission.

(5) The Governor may remove any member of the commission for cause.

(6) Each candidate for appointment to the commission must, before accepting the appointment, undergo background screening under s. 435.04 by filing with the Department of Transportation a complete set of fingerprints taken by an authorized law enforcement agency. The fingerprints must be submitted to the Department of Law Enforcement for state processing, and that department shall submit the fingerprints to the Federal Bureau of Investigation for federal processing. The Department of Transportation shall screen the background results and inform the commission of any candidate who does not meet level 2 screening standards. A candidate who has not met level 2 screening standards may not be appointed to the commission. The cost of the background screening may be borne by the Department of Transportation or the candidate.

(7)(6) The commission shall appoint an executive director who shall serve under the direction, supervision, and control of the commission. The executive director, with the consent of the commission, shall employ such personnel as may be necessary to perform adequately the functions of the commission within budgetary limitations. All Employees of the commission are exempt from the Career Service System.

(8) The commission shall appoint a technical working group that includes representatives of private paratransit providers. The technical working group shall advise the commission on issues of importance to the state, including information, advice, and direction regarding the coordination of services for the transportation disadvantaged. The commission may appoint other technical working groups whose members may include representatives of community transportation

coordinators; metropolitan planning organizations; regional planning councils; experts in insurance, marketing, economic development, or financial planning; and persons who use transportation for the transportation disadvantaged, or their relatives, parents, guardians, or service professionals who tend to their needs.

~~(9)(7)~~ The commission is assigned to the office of the secretary of the Department of Transportation for administrative and fiscal accountability purposes, but it shall otherwise function independently of the control, supervision, and direction of the department.

~~(10)(8)~~ The commission shall develop a budget pursuant to chapter 216. The budget is not subject to change by the department staff after it has been approved by the commission, but it shall be transmitted to the Governor, as head of the department, along with the budget of the department.

Section 2. Subsection (28) is added to section 427.013, Florida Statutes, to read:

427.013 The Commission for the Transportation Disadvantaged; purpose and responsibilities. The purpose of the commission is to accomplish the coordination of transportation services provided to the transportation disadvantaged. The goal of this coordination shall be to assure the cost-effective provision of transportation by qualified community transportation coordinators or transportation operators for the transportation disadvantaged without any bias or presumption in favor of multioperator systems or not-for-profit transportation operators over single operator systems or for-profit transportation operators. In carrying out this purpose, the commission

shall:

(28) In consultation with the Agency for Health Care Administration and the Department of Transportation, develop an allocation methodology that equitably distributes all transportation funds under the control of the commission to compensate counties, community transportation coordinators, and other entities providing transportation disadvantaged services. The methodology shall separately account for Medicaid beneficiaries. The methodology shall consider such factors as the actual costs of each transportation disadvantaged trip based on prior-year information, efficiencies that a provider might adopt to reduce costs, results of the rate and cost comparisons conducted under subsections (24) and (25), as well as cost efficiencies of trips when compared to the local cost of transporting the general public. This subsection does not supersede the authority of the Agency for Health Care Administration to distribute Medicaid funds.

Section 3. This act shall take effect upon becoming a law.

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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.