

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUVENILE SERVICES PROGRAM,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 07-1975BID
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 18, 2007, in Tallahassee, Florida, before Administrative Law Judge Carolyn S. Holifield of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrea V. Nelson, Esquire
The Nelson Law Firm, P.A.
Post Office Box 6677
Tallahassee, Florida 32314

For Respondent: Tonja V. White, Esquire
Department of Juvenile Justice
Knight Building, Room 312L
2737 Centerview Drive
Tallahassee, Florida 32399-3100

STATEMENT OF THE ISSUE

Whether the proposed award of Request for Proposal No. P2021 to Psychotherapeutic Services of Florida, Inc. (hereinafter "Psychotherapeutic Services"), is contrary to

Respondent, Department of Juvenile Justice's (hereinafter "Department"), governing statutes, rules or policies, or the proposal specifications.

PRELIMINARY STATEMENT

On January 22, 2007, the Department issued Request for Proposal No. P2021 (hereinafter "RFP P2021" or "the RFP") to solicit bids for a Detention Screening Unit for the Circuit 17 Juvenile Assessment Center. On April 3, 2007, the Department posted its Notice of Agency Decision, identifying Psychotherapeutic Services as the provider to whom it intended to award the contract. Petitioner, Juvenile Services Program, Inc. (hereinafter "Petitioner" or "Juvenile Services Program"), timely filed a Notice of Intent to Protest on April 4, 2007, indicating its intent to challenge the award. Petitioner filed a Petition for Formal Administrative Hearing (Petition) with the Department on April 13, 2007.

The Petition alleged that Psychotherapeutic Services' bid proposal was non-responsive to the RFP specifications, omitted information requested by the RFP, and failed to submit documentation and information mandated by the RFP. The Petition also alleged that the scoring of Psychotherapeutic Services' proposal by Department employees was arbitrary and capricious.

On May 8, 2007, the Department forwarded the Petition to the Division of Administrative Hearings. On May 10, 2007, the

case was noticed for hearing June 4, 2007. By agreement of the parties, the case was continued, and the hearing was rescheduled for July 18, 2007.

At hearing, Petitioner presented the testimony of Isabella Cox, executive director of Juvenile Services Program; Paul Hatcher; Sarah Smith; Loretta Bright; Lucille Rapale; and Terria Flakes, all employees of the Department. The Department presented no additional witnesses. Joint Exhibits 1, 2 and 3; Petitioner's Exhibits 1 through 5, 7, 8, and 11; and Respondent's Exhibits 3 and 4 were received into evidence.

At the conclusion of the hearing, the parties agreed to file their proposed recommended orders within ten working days from the filing of the transcript. The hearing Transcript was filed on July 27, 2007. The parties timely filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On January 22, 2007, the Department issued RFP P2021 to solicit proposals for a Department Detention Screening Unit in the Circuit 17 Juvenile Assessment Center. The contract for RFP P2021 was for an initial three-year period, with the possibility of renewal for an additional three-year period.

2. Two prospective providers, Petitioner, Juvenile Services Program, and Psychotherapeutic Services submitted responses to RFP P2021.

3. Sarah Smith (hereinafter "Ms. Smith"), acting as the Department's contract administrator, evaluated the proposals for compliance with the mandatory requirements of RFP P2021. Based on Ms. Smith's review of the proposals and her determination that the proposals met the mandatory requirements of the RFP, the Department accepted both Petitioner's proposal and Psychotherapeutic Services' proposal as responsive to the RFP.

4. The RFP consisted of the following three proposals, all of which were evaluated and scored by the appropriate evaluators: (1) the Technical Proposal, which comprises two sub-parts, Management Capabilities and Program Services; (2) the Financial Proposal, which comprises two sub-parts, Price and Financial Capabilities; and (3) the Past Performance Proposal.

5. The maximum allotted points for each of the proposals were as follows:

1. Technical Proposal	
a. Management Capabilities	160
b. Program Services	400
2. Financial Proposal	
a. Price	100
b. Financial Capabilities	100
3. Past Performance (Part I)	200

6. The Technical Proposals were reviewed, evaluated, and scored by three evaluators, Loretta Bright, Lucille Rapale and Terria Flakes. Each evaluator scored each proposal separately and independently without consulting and conferring with the other evaluators. All three evaluators were Department employees who were trained and randomly selected to evaluate the proposals.

7. The scores of the three evaluators who evaluated the Technical Proposal were averaged. Based on those averages, Petitioner was awarded 117.33 points for the Management Capabilities sub-part and 278.33 points for the Program Services sub-part. Psychotherapeutic Services was awarded 108.80 for the Management Capabilities subpart and 276.67 for the Program Services subpart of the Technical Proposal.

8. The Financial Proposal was evaluated by Ms. Smith, an operations and management consultant in the Department's Contract Administration Office, Bureau of Contracts. Based on her evaluation of the Financial Proposals, Ms. Smith awarded 200 points each to Petitioner and Psychotherapeutic Services.

9. The Past Performance Proposals of the RFP were evaluated and scored by Paul Hatcher, a senior management analyst with the Department. Based on Mr. Hatcher's review and evaluation of this section, he awarded 173.75 points to Petitioner and 192.50 points to Psychotherapeutic Services.

10. After calculating the total points awarded for the three proposals/sections of the RFP, Psychotherapeutic Services, with a total score of 777.97, was ranked as the highest scored proposal. Petitioner, with a total score of 769.42, was ranked second.

11. On April 3, 2007, the Department posted the notice of its intended decision to award the contract for RFP P2021 to Psychotherapeutic Services. This decision was based on Psychotherapeutic Services' proposal having a higher point total than Petitioner's proposal.

General Instructions for Completing RFP P2021

12. RFP P2021 is comprised of a one-page transmittal letter and several attachments and exhibits, some of which are in the 47-page printed RFP P2021, and others which, according to the RFP, are available electronically.

13. Relevant to this proceeding are terms contained in the transmittal letter and in Attachments A, B, C, D, G and J.

14. Several provisions in RFP P2021, including the transmittal letter and Attachments A and B, give general instructions for preparation of the proposal.

15. The transmittal letter provides that "prospective providers shall fully comply with the instructions on how to respond to the RFP."

16. Attachment A, General Instructions to Respondents, provides that "respondents to the solicitation are encouraged to carefully review all the materials contained herein and prepare responses accordingly."

17. Attachment B, Section XVIII, "General Instructions for the Preparation and Submission of Proposals," provides in relevant part the following:

The instructions for this RFP have been designed to help ensure that all proposals are reviewed and evaluated in a consistent manner, as well as to minimize costs and response time. INFORMATION SUBMITTED IN VARIANCE WITH THESE INSTRUCTIONS MAY NOT BE REVIEWED OR EVALUATED.

* * *

Failure of the prospective Provider to provide any of the information required in either Volume 1 (the Technical Proposal), Volume 2 (the Financial Proposal), or Volume 3 (Past Performance) portions of the RFP proposal shall result in no points being awarded for that element of the evaluation.

18. Attachment B also provides the general instructions for the Technical Proposal, the Financial Proposal and the Past Performance Proposal of RFP P2021. Those instructions are described and discussed below.

19. Notwithstanding the general instructions for completing the RFP, Attachment A, paragraph 15, gives the Department the right to waive any minor irregularities. According to that provision, "[t]he Department reserves the

right to accept or reject any and all bids, or separable portions thereof, and to waive any minor irregularity, technicality, or omission if the Department determines that doing so will serve the State's best interests."

20. The RFP deems certain requirements as mandatory. Attachment B, Section V, sets forth those requirements and the consequences for a prospective provider's failing to comply with those requirements.

21. Attachment B, Section V, provides in pertinent part the following:

Mandatory Requirements

The following requirements must be met by the prospective Provider to be considered responsive to this RFP. Although there are other criteria set forth in this RFP, these are the only requirements deemed by the Department to be mandatory. Failure to meet these requirements will result in a proposal not being evaluated and [being] rejected as non-responsive. [Emphasis supplied.]

- A. It is MANDATORY that the prospective Provider submit its proposal within the time frame specified in the Calendar of Events (Attachment B, Section IV.)
- B. It is MANDATORY that the prospective Provider draft and submit a fully completed, originally signed Transmittal Letter that contains all the information required by Section XVIII. A.
- C. It is MANDATORY that the prospective Provider submit a complete and signed Attachment J that proposes an annual contract dollar amount at or below the

annual maximum contract dollar amount stated in the RFP. Any proposal without a completed and signed Attachment J or with a proposed annual contract dollar amount exceeding the annual maximum contract dollar amount will be rejected.

22. Attachment D, "Evaluation Criteria," sets forth the evaluation criteria and the scoring methods for proposal. Attachment D also provides that failure to meet the mandatory requirements "that are specified in Attachment B, Section V," will result in the proposal not being evaluated and being rejected as non-responsive.

The Financial Proposal

23. Attachment B, Section XVIII, D.1., provides in pertinent part the following:

- a. The prospective Provider shall provide a price for the program by returning a completed and signed Attachment J-Price Sheet. The price evaluated is the "proposed Annual Contract Amount." The price must include all services, material and labor necessary to complete the Scope of Services (Exhibit 1) as described in this RFP and the prospective Provider's proposal. A renewal price shall also be entered on Attachment J.
- b. It is MANDATORY that the prospective Provider submit a completed and signed Attachment J that proposes an annual contract amount at or below the annual maximum contract dollar amount stated in the RFP. Any proposal without a completed and signed Attachment J or with a proposed dollar amount exceeding the annual maximum contract dollar amount will be rejected.

24. RFP P2021 established the "annual maximum contract dollar amount" as \$473,594.16 and the "maximum contract dollar amount" as \$1,420,782.48 (three times the annual maximum contract amount).

25. Attachment J had three lines on which the prospective provider was to list: (1) the "proposed annual dollar amount"; (2) the "proposed annual dollar amount for each renewal year"; and (3) the "renewal dollar amount proposed."^{1/} Attachment J also included directions for completing the form and a line for the prospective provider's signature. A pre-printed statement above the signature line indicated that "[b]y submission and signature of this form, the prospective provider agrees to all the terms and conditions of this RFP and commits to the prices stated."

26. In lieu of submitting the Amendment J form that was attached to the RFP, Psychotherapeutic Services submitted its re-created version of Attachment J.

27. The Department recognized that the page titled Attachment J in Psychotherapeutic Services' proposal was re-created by Psychotherapeutic Services. However, the re-created version of Attachment J and submission of that document does not in itself constitute a non-responsive response. In the Department's view, the significant factor is whether the relevant and required information indicated as

mandatory in the RFP is provided on the re-created version of the form.

28. By consistent practice, the Department routinely accepts re-created forms and/or attachments in responses from prospective providers for the convenience of respondents. In accordance with this practice, the Department accepted the re-created Attachment J submitted by Psychotherapeutic Services.

29. On the re-created version of Attachment J, Psychotherapeutic Services did not include: (1) the instructions for completion of the form; and (2) the language that by signing and submitting the form, Psychotherapeutic Services agrees to all the terms and conditions of the RFP and commits to the prices stated. However, Psychotherapeutic Services included on the re-created Attachment J all the relevant and required information as indicated by the mandatory requirements in the RFP.

30. The mandatory requirements related to the Financial Proposal are that the provider "submit a completed and signed Attachment J that proposes an annual contract dollar amount that is at or below the maximum contract dollar amount stated in the RFP. See paragraphs 21 and 23 above.

31. The mandatory requirements for the Financial Proposal do not require the "renewal terms" to be included in the re-created version of Attachment J, but require that the

proposed annual contract amount be at or below the annual maximum contract amount. Similarly, there is no mandatory requirement that omission of the "renewal terms" must result in a finding that the proposal is non-responsive. At most, if such language were required and not provided, no points should be awarded for that section. Here, the evaluation criteria for the Financial Proposal does not include or require consideration of the "renewal terms" on Attachment J.^{2/} See Attachment A, paragraph 9(i) and (j); Attachment B, Section XIV; and Attachment G, Part IV, C.

32. The re-created version of Attachment J, as completed by Psychotherapeutic Services, is as follows:

ATTACHMENT J - PRICE SHEET

JUVENILE ASSESSMENT CENTER SERVICES

PROPOSED ANNUAL DOLLAR AMOUNT:

\$473,593.47

PROPOSED ANNUAL DOLLAR AMOUNT FOR EACH RENEWAL YEAR:

\$473,593.47

*PROPOSED ANNUAL MAXIMUM CONTRACT DOLLAR AMOUNT for all Services in this [sic] RFP multiplied [sic] by the number of initial years (3) of the contract + [sic] \$1,420,782.48 \$1,420,780.41^[3/]

*THE ANNUAL MAXIMUM CONTRACT DOLLAR AMOUNT WILL BE MULTIPLIED BY THE NUMBER OF YEARS [sic] IN THE INITIAL TERM OF THE CONTRACT FOR THE PURPOSES OF SCORING THE PRICE SECTION OF THIS PROPOSAL. THE PRICE STATED ON THIS SHEET (ATTACHMENT J) WILL BE USED FOR DETERMINATION [sic] OF POINTS AWARDED TO EACH

PROSPECTIVE PROVIDER. TERMS OF LESS THAN ONE YEAR SHALL BE PRO-RATED.

RENEWAL TERM DOLLAR AMOUNT PROPOSED: \$473,594.16^[4/1]

33. Psychotherapeutic Services' proposed annual contract dollar amount of \$473,593.47 is below the annual maximum contract dollar amount stated in the RFP, \$473,594.16. Therefore, it met the mandatory requirement for the price category of the Financial Proposal.

34. Ms. Smith testified credibly that the Department's focus, as reflected in the evaluation criteria, is to ensure that the proposed annual contract dollar amount does not exceed the annual maximum contract dollar amount stated in the RFP.

35. Ms. Smith evaluated and scored that Psychotherapeutic Services' proposal in accordance with the provisions of the RFP. Based on her evaluation, Ms. Smith properly awarded Psychotherapeutic Services the maximum 200 points for its Financial Proposal. Of those points, 100 points were for the "price" category.

36. Ms. Smith also awarded Petitioner's Financial Proposal the maximum 200 points for its Financial Proposal, including 100 points for the "price" category. Petitioner was awarded 100 points for the "price" category, even though its proposed annual contract amount was higher than that of Psychotherapeutic Services. Ms. Smith determined that this was appropriate

because the difference in the price proposed by Petitioner and Psychotherapeutic Services was less than ten percent.

37. Psychotherapeutic Services submitted a signed and completed Attachment J that included a proposed annual contract dollar amount, \$473,593.47, which was below the annual maximum contract dollar amount stated in the RFP, \$473,594.16. Having met the mandatory provisions of the RFP, related to Attachment J, the Department appropriately did not reject the Psychotherapeutic Services, but instead properly evaluated that proposal.

The Technical Proposal

38. The Technical Proposal required prospective providers to prove that they were registered to do business in Florida.

39. The general instructions for preparation of the Technical Proposal of the RFP are set forth in Attachment B, Section XVIII, C.2., which provides in relevant part:

a. Management Capability

* * *

- 3) This section shall provide proof that the prospective Provider is registered to do business in Florida evidenced by Articles of Incorporation or Fictitious Name Registration or Business License and, if applicable, a copy of the most recent Certification of Good Standing. (This information may be obtained from the Secretary of State's Office)

40. Psychotherapeutic Services did not submit as part of its proposal Articles of Incorporation, Fictitious Name Registration, or Business License to prove that it is licensed to do business in the State of Florida. However, Psychotherapeutic Services submitted an untitled document that appeared to be a certificate from the State of Florida, Department of State, which had the electronic signature of the Secretary of State and was dated May 13, 2006.

41. Petitioner submitted its Articles of Incorporation, as well as the untitled document from the Department of State. (The latter document was the same type of certificate Psychotherapeutic Services submitted with its proposal.)

42. That referenced untitled document stated in relevant part the following:

I [Secretary of State] certify from the records of this office that PSYCHOTHERAPEUTIC SERVICES OF FLORIDA, INC. is a corporation organized under the laws of Delaware, authorized to transact business in the State of Florida, qualified on December 4, 1996.

* * *

I further certify that said corporation has paid all fees due this office through December 31, 2006, that its most recent annual report was filed on May 10, 2006, and its status is active.

I further certify that said corporation has not filed a Certificate of Withdrawal.

43. The document was identified at hearing by Petitioner's executive director as a Certificate of Good Standing. However, there was nothing on the document to indicate what the document was.

44. The Technical Proposals were rated on a scale of zero to five, based on criteria established in the RFP. The rating system for the Technical Proposal was as follows:

<u>Score</u>	<u>Evaluation Description</u>
5	The proposal exceeds all technical specifications and requirements for the component specified. The approach is innovative, comprehensive, and complete in every detail.
4	The proposal meets all technical specifications and requirements for the component specified. The approach is comprehensive and complete in every detail. The proposal approach contains some innovative details for some of the components specified.
3	The proposal meets all technical specifications and requirement for the component specified.
2	The proposal does not meet all technical Specifications and requirements for the component specified, or it does not provide essential information to substantiate the provider's ability to provide the service.
1	The proposal contains errors and/or omissions in the area of the component specified.

0 The provider's proposal fails to demonstrate the ability to provide the service.

45. The evaluation criteria for Criterion No. 2, which relates in part to prospective providers being registered to do business in the State of Florida, required the evaluators to rate the proposal on the following:

Does the proposal reasonably, logically, and clearly identify an organizational structure with the capability to perform the services specified and required by the RFP?

46. Petitioner contends that Psychotherapeutic Services failed to respond fully to the Technical Proposal by not submitting the Articles of Incorporation, Fictitious Name Registration, or Business License, whichever was applicable. By failing to submit any of the other named documents, Petitioner contends that Psychotherapeutic Services' Technical Proposal was non-responsive.

47. The untitled documents submitted by both Petitioner and Psychotherapeutic Services, described in paragraph 42, appeared to be issued by the State of Florida. The evaluators' credible testimony was that they interpreted and considered the certificate from the Department of State as the Business License, and/or one of the other acceptable means of proof that the prospective providers were registered to do business in Florida, as required in the RFP.

48. In light of their review and interpretation of the document from the Department of State, the evaluators awarded Psychotherapeutic Services' proposal and Petitioner's proposal the following scores for Evaluation Criterion No. 2:

	Psychotherapeutic Services	Juvenile Service Program
Evaluator Bright	4	4
Evaluator Flakes	3	4
Evaluator Rapale	3	3

49. Petitioner contends that because Psychotherapeutic Services did not submit its Articles of Incorporation, Fictitious Name Registration, or Business License as required by the RFP,^{5/} it should not have received scores of three or above for Criterion No. 2.

50. The RFP required the prospective providers' proposals: (1) to include a work plan for the collaboration and coordination of operations with other agencies providing services at the Circuit 17 Juvenile Assessment Center; and (2) to specify procedures for collaboration and coordination with the local Department office in certain cases.

51. Evaluation Criterion No. 3 provides as follows:

Does the proposal reasonably, logically, and clearly identify the providers' intended interaction with local service resources as specified and required by the RFP?

52. There is no dispute that both Psychotherapeutic Services' and Petitioner's proposals addressed the issues noted

in paragraph 50 above. In addition to complying with those requirements, Petitioner submitted three letters of support to supplement its response to the requirement regarding the involvement of local agencies.

53. As to Evaluation Criterion No. 3, Psychotherapeutic Services' proposal was awarded two scores of three and one score of four. Petitioner's proposal was awarded scores identical to those of Psychotherapeutic Services' scores.

54. Petitioner argues that it should have been awarded more points and/or Psychotherapeutic Services should have been awarded fewer points for Evaluation Criterion No. 3, because it submitted three letters to indicate community support and no such letters were provided by Psychotherapeutic Services to support its bid proposal.

55. The RFP neither prohibited, nor required, prospective providers from submitting letters to supplement their responses related to collaborating and coordinating with local agencies. Accordingly, no points were awarded or required to be awarded based on the submission of letters of support.

56. The three evaluators' scores were based on their individual review and evaluation of the proposals submitted by Petitioner and by Psychotherapeutic Services. No proposal was scored against each other, but rather each proposal was scored separately and not compared to each other.

Past Performance

57. The general instructions for preparation of the Past Performance section of the RFP are provided in Attachment B, Section XVIII, E., which states in relevant part the following:

1. The purpose of this section is for the prospective provider to demonstrate its knowledge and experience in operating similar programs by providing information requested on the enclosed Attachment C, Part I, II, and/or III and all required supporting documentation.
 - a. On the forms provided (Attachment C, Part I, II and/or III), the prospective Provider shall provide, if applicable, information regarding its past performance in the State of Florida, information regarding programs operated by the prospective Provider that have attained professional accreditation, and information regarding past performance in the United States outside of the State of Florida.
 - b. The prospective Provider shall complete Attachment C and attach dated supporting documentation for Part II and/or III, if applicable.
 - c. Failure to complete and return Attachment C for this RFP or supporting documentation, if applicable, shall result in a zero (0) score for Past Performance.
 - d. All documentation provided for Parts II or III of Attachment C must include the start and end dates, be current dated and valid at least through the start date of the Contract that results from this RFP. The documentation must state that the program is a non-residential juvenile

[program] and that is run by the prospective Provider. The Department is not responsible for research to clarify the prospective Provider's documentation.

- e. Prospective providers shall include the Attachment C, Part I, II and/or III for this RFP and the required supporting documents in Volume III. Failure to include these documents in Volume III shall result in zero (0) points being awarded for Past Performance. Further instructions on how to complete this section may be found in Attachment C.

58. Attachment C provides in relevant part the following:

If the prospective Provider has received Florida Department of Juvenile Justice Quality Assurance (QA) Reviews for its Non-Residential programs, that prospective Provider shall complete Parts I and III. Only scores from Parts I and III shall be considered for these prospective Providers. A prospective Provider who is operating or has operated Non-Residential program(s) in Florida must complete Part I of Attachment C. To complete Part I of Attachment C, the prospective Provider shall list all non-residential program information requested for each category. Failure to submit the attached Part I shall result in a score of zero (0) for this section. Part I of other RFP's will not be considered.

All other prospective Providers shall complete Parts II and III. . . .

59. The RFP required prospective providers to provide information regarding their past performance of juvenile justice non-residential programs on Attachment C, which consists of the following three parts:

- a. Part I, "Data Sheet: Past Performance on Non-Residential JAC [Juvenile Assessment Center] Programs;
- b. Part II, "Evaluation Questionnaire for Past Performance in the United States Outside of Florida"; and
- c. Part III, titled "Evaluation Questionnaire for Professional Accreditation in the United States."

60. Psychotherapeutic Services was required to complete Attachment C, Part I, because it had experience operating a non-residential juvenile justice program in the State of Florida. However, because the programs Psychotherapeutic Services operated in Florida did not have professional accreditation, it was not required to complete Attachment C, Part III.

61. Attachment C, Part I, required each respondent to provide the following information about non-residential programs it operates, or has operated, in the State of Florida:

- a. the program(s) that it had contracts to administer;
- b. the contract number(s);
- c. the program type;
- d. the beginning date of the contract;
- e. the ending date of the contract;
- f. the most recent quality assurance performance score of the program; and
- g. the most recent quality assurance compliance score of the program.

62. For each category on Attachment C, Part I, there was a corresponding footnote, which provided the rationale and/or explanation regarding the requested information.

63. Relevant to this proceeding are the categories contract number, the most recent quality assurance (QA) performance score, the most recent QA compliance score, and the footnotes related thereto.

64. The footnote that corresponds to the category "contract number" provides the following: "This information is only to aid the Department in identifying the program named."

65. The footnote that corresponds to the category "most recent quality assurance performance score," provides the following: "Quality Assurance Performance score for current year. If not evaluated yet and the program was reviewed last year, use last year's score."

66. The footnote that corresponds to the "most recent Quality Assurance compliance score" provides the following: "Quality Assurance compliance score. If not evaluated yet and the program was reviewed last year, use last year's score."

67. Psychotherapeutic Services did not submit the Attachment C, Part I, form that was included in the RFP. Instead, Psychotherapeutic Services prepared a re-created version of that form which was completed and submitted as part of its proposal. Except for a notation explaining its responses

to the categories related to QA performance and compliance scores, Psychotherapeutic Services' re-created version of Attachment C, Part I, was almost identical to the Department's Attachment C.

68. On the re-created Attachment C, Part I, Psychotherapeutic Services listed the one non-residential program it was operating in Florida and provided responses to the specified categories as follows:

<u>Category</u>	<u>Response</u>
a. Program Name	Intensive Delinquency Diversion Services (IDDS)
b. Contract Number	R601
c. Program Type	Probation/Community Service
d. Contract Begin Date	9/15/2003
e. Contract End Date	9/14/2009
f. Most Recent QA Performance Score	90 percent or Above
g. Most Recent QA Compliance Score	90 percent or Above

69. Psychotherapeutic Services included a notation on the re-created Attachment C, Part I, to explain the responses of "90% or above" that were listed as the most recent QA performance score and the most recent compliance score. The

notation stated, "To maintain 'deemed status' all scores must be 90 percent or above. We do not have an exact number score."

70. Petitioner contends that Psychotherapeutic Services' Past Performance Proposal is non-responsive to the RFP. First, Petitioner contends that Psychotherapeutic Services failed to submit the required information on the Attachment C form that was attached to the RFP, but submitted its information on the re-created version of Attachment C.

71. The Department acknowledged that Psychotherapeutic Services re-created Attachment C, Part I. However, as previously indicated, the Department does not penalize respondents for re-creating required forms for their convenience. Rather, the information required by the forms must be provided in the response to obtain the proper score or evaluation.

72. In response to the category related to the contract number of the program it was currently operating, Psychotherapeutic Services incorrectly listed the contract number as R601. The correct contract number of the non-residential program Psychotherapeutic Services was currently administering is RK601.

73. The Department acknowledged that there was a typographical error or mistake on the re-created Attachment C, Part I, in listing the contract number of the program operated

by Psychotherapeutic Services. However, the Department determined that this error was not critical with regard to the information that was to be provided.^{6/}

74. Attachment C requires a respondent to provide performance and compliance scores for its most recent QA review of any programs currently run by the prospective provider. Instead of providing an exact score for the QA reviews, Psychotherapeutic Services provided and inserted a score of "90% or above" as their most recent QA performance and compliance scores on its Attachment C, Part I form. By way of explanation, Psychotherapeutic Services included a notation that the score was based on its "special deemed status."

75. In accordance with the RFP, Psychotherapeutic Services submitted a report from the Department's Bureau of Quality Assurance as supporting documentation for information regarding its QA performance and compliance scores. The report confirmed Psychotherapeutic Services' responses regarding its most recent performance and compliance scores.

76. The report from the Department's Bureau of Quality Assurance reflected that Psychotherapeutic Services' program received QA scores in 2003, but had not received any scores since then. As a result of its QA scores in 2003, Psychotherapeutic Services received "deemed status" by the Department. Psychotherapeutic Services had not received QA

scores during the current year or the year prior to responding to the RFP. Therefore, Psychotherapeutic Services retained its special "deemed status" every year since 2003. The supporting documentation explained that to retain "deemed status," a provider must obtain a score of 90 percent or above each year at program review.

77. The Department will no longer be using "deemed status" in the future, but that decision does not affect a provider/program currently holding this status. Thus, the status and scores as reported by Psychotherapeutic Services on the re-created version of Attachment C were properly reported at the time the proposal was submitted, verified, and scored.

78. It is the Department's practice to verify the scores provided by the prospective providers who complete Attachment C, Part I, by accessing the information on the Department's Bureau of Quality Assurance website. This website is not limited to use by the Department, but is also available for use by the general public.

79. Prior to scoring Past Performance proposals, the evaluator, Mr. Hatcher always verifies the QA information provided by any prospective provider using the official Department QA reports on the Department's Bureau of Quality Assurance website. He does not and has never viewed this practice as research, but as verification. The QA scores listed

on the Department's official reports are the scores used by Mr. Hatcher in scoring the Past Performance Proposals.

80. Consistent with his usual practice, Mr. Hatcher verified the responses given in Psychotherapeutic Services' proposal by accessing the Department's Bureau of Quality Assurance website. Mr. Hatcher used the scores on the official report posted on that website to evaluate the Past Performance Proposals.

81. The information on the Department's Bureau of Quality Assurance website confirmed that Psychotherapeutic Services' performance and compliance scores were 90 percent or above. Psychotherapeutic Services' performance score was 95 percent, and its compliance score was 100 percent.

82. Mr. Hatcher also utilized the Department's Bureau of Quality Assurance to verify the information provided by Petitioner and confirmed that Petitioner's most recent average QA performance and compliance scores were 82.5 percent and 100 percent, respectively. These were the QA scores Petitioner provided on Attachment C, Part I, of its proposal for the average of its most recent QA performance and compliance scores.

83. The "90% or above" figure provided by Psychotherapeutic Services, while accurate, is not a specific numbered percent score that could be used in calculating Psychotherapeutic Services' overall score for its Past

Performance Proposal. Therefore, the evaluator appropriately did not use those figures. Instead, he used Psychotherapeutic Services' QA performance and compliance figures, 95 percent and 100 percent, that were on the Department's Bureau of Quality Assurance website.

84. To determine the score for the Past Performance Proposal, the evaluator had to apply the required formula. The formula required that the most recent average performance score be multiplied by 1.5 and the most recent average compliance score be multiplied by 0.5. The score for the Past Performance Proposal is the sum of those numbers.

85. By applying the required formula, Psychotherapeutic Services was awarded 142.5 points for its performance score and 50 points for its compliance score. This resulted in Psychotherapeutic Services being appropriately awarded a total score of 192.50 points for its Past Performance Proposal.

86. By applying the required formula, Petitioner was awarded 123.75 points for its performance score and 50 points for its compliance scores. This resulted in Petitioner's being appropriately awarded a total score of 173.75 points in the Past Performance Proposal.

87. The evaluators for the Technical Proposal, the Financial Proposal and the Past Performance Proposal of RFP P2021 properly and adequately evaluated those proposals.

CONCLUSIONS OF LAW

88. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. § 120.57(3)(f), Fla. Stat. (2007).

89. Subsection 120.57(3)(f), Florida Statutes (2006), provides in relevant part the following:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. . . 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. . . .

90. Petitioner contends that Psychotherapeutic Services' proposal was non-responsive, because it failed to do the following: (1) submit certain information on the Department's standardized forms; (2) provide information required by RFP to establish that it is registered to do business in the State of Florida; and (3) provide specific scores regarding its most recent QA performance and compliance scores, but submitted a

scoring range. Petitioner also contends that the evaluators' scoring of the proposals was arbitrary and capricious in that they did not adhere to the RFP specifications.

91. Petitioner has the burden to establish that the decision to award the contract to Psychotherapeutic Services must be invalidated. Moreover, as the party challenging the proposed agency action, Petitioner has the burden of proof in this proceeding and must show that the agency's proposed action is contrary to the agency's governing statutes, rules, policies, or proposal specifications.

92. Under Subsection 120.57(3)(f), Florida Statutes (2006), it is not enough for Petitioner to show that the proposed award of the contract is contrary to the agency's governing statutes, rules, policies, or proposal specifications. To prevail, Petitioner must also show that the proposed award is clearly erroneous, contrary to competition, or arbitrary or capricious.

93. A decision is considered to be clearly erroneous when although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if it is not

supported by facts or logic. See Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Webster v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931).

94. Agencies have wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. State, Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

95. The purpose of a bid protest proceeding, such as this one, is to evaluate the action taken by the agency based on information available to the agency at the time it took the action. See § 120.57(3)(f), Fla. Stat. (2006); State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

96. Petitioner has failed to meet its burden of proof.

97. The evidence failed to prove that the Department's acceptance of the Psychotherapeutic Services' proposal was contrary to the RFP specifications. Moreover, the evidence also

failed to prove that the evaluation of that proposal was contrary to the RFP specifications and was, therefore, arbitrary and capricious.

98. In this case, the evidence failed to prove that the proposed award to Psychotherapeutic Services' proposal is contrary to the RFP specifications. Even if it is contrary to the specifications, the evidence failed to establish that the award is clearly erroneous, contrary to competition, or arbitrary and capricious.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Juvenile Justice, issue a final order dismissing the Juvenile Services Program, Inc.'s, Petition.

DONE AND ENTERED this 31st day of October, 2007, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2007.

ENDNOTES

^{1/} Attachment J also included the pre-printed figure "473,594.16" as the "proposed annual maximum contract dollar amount." That figure was mislabeled and was, in fact, the "annual maximum contract dollar amount" as established in the RFP.

^{2/} Petitioner argues that the "renewal terms" on the Department's Attachment J are material and the omission of these terms from the re-created version of Attachment J is a basis for finding the Financial Proposal non-responsive. Petitioner further contends that the absence of the "renewal language" means that the prospective provider need not comply with its "proposed" price should the contract be awarded and then renewed. However, these arguments are not supported by the record. Throughout the RFP, including Attachment G, the contract, it is clear that should the contract be renewed, the terms and conditions of the renewal are the same as those in the initial contract. The contract, which is to be executed after the award of the RFP, is the document that obligates the parties to comply with the "renewal terms" of the RFP.

^{3/} Psychotherapeutic Services mistakenly indicated that the \$1,420,780.41 figure was the "proposed annual maximum contract amount," when it is clear that the figure was the "proposed maximum contract dollar amount." That error is similar to one that was on Attachment J that was attached to the RFP. On the Department's Attachment J, the pre-printed figure of \$473,594.16 was mistakenly referred to as the "proposed annual maximum contract dollar amount" when, in fact, that figure was the "annual maximum contract dollar amount."

^{4/} The "renewal term dollar amount proposed" listed as \$473,594.16 is actually the "annual maximum contract dollar amount." Despite this mistake, Psychotherapeutic Services' "renewal term dollar amount proposed" could be easily determined to be \$1,420,780.41. (This figure is obtained by multiplying the renewal term (3 years) times \$473,593.47, Psychotherapeutic Services' "proposed annual dollar amount for each renewal year."

^{5/} See Attachment B, Section XVIII, C.2, quoted in paragraph 21 of Findings of Fact.

^{6/} The correct number was also on the report submitted as supporting documentation for Psychotherapeutic Services' most recent performance and compliance scores. See paragraphs 75 and 76 of Findings of Fact.

COPIES FURNISHED:

Andrea V. Nelson, Esquire
The Nelson Law Firm, P.A.
Post Office Box 6677
Tallahassee, Florida 32314

Tonja V. White, Esquire
Department of Juvenile Justice
Knight Building, Room 312L
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Walt McNeil, Secretary
Department of Juvenile Justice
Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Jennifer Parker, General Counsel
Department of Juvenile Justice
Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-3100

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.