

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ECKERD YOUTH ALTERNATIVES,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 07-4609BID
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent,)
)
and)
)
DANIEL MEMORIAL, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by
Administrative Law Judge T. Kent Wetherell, II, on November 8,
2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Martha Harrell Chumbler, Esquire
Daniel Hernandez, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

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

For Intervenor: Cynthia S. Tunnickliff, Esquire
Brian A. Newman, Esquire
Pennington, Moore, Wilkinson, Bell &
Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the proposed award of the contract for Request for Proposals (RFP) No. P2032 to Daniel Memorial, Inc. (Daniel), is contrary to the specifications of the RFP.

PRELIMINARY STATEMENT

On June 11, 2007, the Department of Juvenile Justice (DJJ) posted notice of its intent to award the contract for RFP No. P2032 to Daniel. Eckerd Youth Alternatives, Inc. (EYA), the second-ranked vendor, timely filed a notice of protest and formal written protest with DJJ challenging the proposed award of the contract to Daniel.

By letter dated September 28, 2007, DJJ referred the protest to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct a formal hearing on the protest. The referral was received by DOAH on October 3, 2007.

Daniel filed a petition to intervene, which was granted through an Order entered on October 18, 2007. The petition to intervene filed by the third-ranked vendor, Boley Centers, Inc., was denied through an Order entered on October 24, 2007.

The final hearing was held on November 8, 2007. At the hearing, EYA presented the testimony of Ellyn Evans, Paul Hatcher, and Jim Sartain; and Daniel presented the testimony of Jim Clark and the deposition testimony of Vicki Waytowich and Dr. Hilda Shirk. The following exhibits were received into evidence: Joint Exhibits 1 through 7; Petitioner's Exhibits 1 through 3; and Intervenor's Exhibits 1 and 2.

The Transcript of the final hearing was filed on November 26, 2007. The parties were given 10 days from that date to file proposed recommended orders (PROs). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. DJJ issued RFP No. P2032 on April 2, 2007.
2. The RFP solicited proposals for a "20-slot day treatment program for youth placed on Probation, being released from a residential program, transitioning back into the community or classified as minimum risk, and a 100-slot service-oriented Intervention program with comprehensive case management services for youth which the programs are currently located in Pinellas and Pasco Counties"
3. The contract resulting from the RFP will be for a three-year term -- July 1, 2007 through June 30, 2010 -- with a renewal option for up to an additional three years at DJJ's sole discretion. The RFP states that the maximum annual contract

amount is \$948,308, and prospective providers were required to propose a price at or below that amount

4. EYA and Daniel submitted timely, responsive proposals in response to the RFP.

5. Daniel's proposal offered a slightly lower price than EYA's proposal.¹

6. On June 11, 2007, DJJ posted notice of its intent to award the contract to Daniel. Thereafter, EYA timely filed a notice of intent to protest and a formal written protest challenging the proposed award of the contract to Daniel.

7. The RFP provides that the proposals were to be evaluated and scored in three categories: technical proposal, financial proposal, and past performance.

8. The past performance category focuses on the prospective provider's knowledge and experience in operating non-residential juvenile justice programs. The criteria related to the past performance category are contained in Attachment C to the RFP.

9. Attachment C consists of three parts: Part I - Past Performance of Non-Residential Programs; Part II - Evaluation for Past Performance in the United States Outside of Florida; and Part III - Evaluation for Professional Accreditation in the United States. The focus of the dispute in this case is on Part III.

10. A proposal could receive a total of 1,000 points if, as is the case with both EYA and Daniel, the prospective provider operated other DJJ-contracted non-residential programs in Florida. The proposals could receive up to 240 points for Attachment C, with a maximum of 40 points for Part III.

11. The RFP provides that the proposal that receives the highest total points will be awarded the contract.

12. Daniel's proposal received a total of 600.13 points, which was the highest overall score. Daniel received 176 points for Attachment C, including 30 points for Part III.

13. EYA's proposal received a total of 573.46 points, which was the second highest overall score. EYA received 143.7 points for Attachment C, including zero points for Part III.

14. EYA contends that Daniel should not have received any points for Part III, which would have resulted in Daniel's overall score being 30 points lower, or 570.13, and would have given EYA the highest overall score.

15. Part III of Attachment C asks whether the prospective provider currently operates non-residential juvenile justice programs that are accredited and in good standing with certain accrediting agencies, including the Council on Accreditation (COA). If so, the RFP requires the prospective provider to include supporting documentation.

16. The prospective provider receives 10 points for each accredited program listed in Part III of Attachment C.

17. The RFP states multiple times that the supporting documentation "must include the start and end dates [of the programs], be current dated and valid at least through the start date of the Contract that results from this RFP," and that it must state that "the program cited is a non-residential juvenile program and that is run by the prospective Provider."

18. The RFP also states multiple times that a prospective provider's failure to provide the required supporting documentation "shall" result in zero points being awarded for Part III of Attachment C, and that DJJ "is not responsible for research to clarify the prospective Provider's documentation."

19. EYA did not list any programs in its response to Part III of Attachment C. Its wilderness programs are accredited by COA, but its non-residential juvenile justice programs are not accredited. EYA is currently seeking COA accreditation for the services provided in its non-residential programs based, in part, on DJJ's scoring of Daniel's proposal in this proceeding.

20. Daniel listed three programs in its response to Part III: a behavioral management program in Circuit 4; a conditional release program in Circuits 6 and 13; and a behavioral management program in Circuit 7.

21. The documentation provided by Daniel to show that the listed programs are accredited was a letter from COA dated August 18, 2006. The letter confirms that Daniel is accredited by COA; that the accreditation runs through September 30, 2010; and that the accreditation includes "the following programs:"

- Mental Health Services
- Psychosocial and Psychiatric Rehabilitation Services
- Employee Assistance Program (EAP) Services
- Case Management Services
- Foster and Kinship Care Services
- Supported Community Living Services
- Residential Treatment Services

22. The letter does not on its face refer to the three programs listed by Daniel in its response to Part III.

23. The letter does not on its face reflect whether the listed services were accredited in non-residential programs (as compared to residential programs) or in juvenile justice programs (as compared to adult programs or juvenile programs that do not involve the juvenile justice system).

24. Each of the three programs listed by Daniel in its response to Part III is a non-residential program operated under contract with DJJ. Those programs were also listed by DJJ contract number in Daniel's response to Part I of Attachment C.

25. Paul Hatcher, the DJJ employee who evaluated the responses to the RFP with respect to Attachment C, was familiar with the three programs listed in Daniel's response to Part III.

He knew from his experience and his review of Part I of Attachment C that the programs were non-residential juvenile justice programs and he knew that the programs provided case management services and mental health services.

26. Mr. Hatcher acknowledged that the COA letter does not specifically mention the three listed programs. He nevertheless considered the letter to be sufficient documentation of accreditation for the three programs because the letter indicated that Daniel, as an organization, was accredited and that it had specific accreditation for the services provided at the three listed programs.

27. COA accredits organizations and services, not specific programs.² On this issue, Dr. Hilda Shirk, a member of the COA Board of Trustees and an experienced COA peer reviewer, testified that "COA accreditation applies to the entire organization and the services that it provides" and that Daniel's accreditation includes all of its programs that fall under the service areas listed in the COA letter, which is consistent with Mr. Hatcher's interpretation of the letter.

28. COA does not separately accredit services provided in residential and non-residential settings, nor does it separately accredit services provided to adults or juveniles. The standards used to evaluate case management services and mental

health services, for example, are the same notwithstanding the setting or the type of client being served.

29. COA performed its on-site accreditation review of Daniel in April 2006. It is unlikely that two of the three programs listed by Daniel in response to Part III -- the conditional release program in Circuits 6 and 13 (DJJ Contract No. P2013 and the behavior management program in Circuit 7 (DJJ Contract No. G8101 -- were evaluated by COA as part of that review because those programs had just started.

30. That does not mean, however, that those programs are not accredited. Indeed, Dr. Shirk testified that an organization is not required to submit each new program to COA for review if the services offered in the program fit within a service area for which the organization has been accredited.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.³

32. EYA has standing to protest the proposed award of the contract to Daniel because its proposal received the second-highest overall score. See Preston Carroll Company, Inc. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 525 (Fla. 3d DCA 1981).

33. EYA has the burden of proof in this proceeding. See § 120.57(3)(f), Fla. Stat.; State Contracting & Engineering Corp. v. Dept. of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998)

34. The scope of this proceeding and the nature of EYA's burden of proof are as follows:

In a competitive-procurement protest, other than a rejection of all bids . . . , 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.

§ 120.57(3)(f), Fla. Stat.

35. It is not enough under Section 120.57(3)(f), Florida Statutes, for the protestor to show that the proposed award is inconsistent with some provision of the RFP; the protestor must also show that agency's "misstep" and, hence, the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious. See First Communications, Inv. v. Dept. of Corrections, Case No. 07-0630BID, 2007 Fla. Div. Adm. Hear. LEXIS 201, at ¶ 34(DOAH Apr. 5, 2007; DOC Apr. 26, 2007) (citing Syslogic Technology Services, Inc. v. South Florida Water

Management District, Case No. 01-4385BID, 2002 Fla. Div. Adm. Hear. LEXIS 235, at ¶¶ 40-74 (DOAH Jan. 18, 2002)).

36. The standards of proof in Section 120.57(3)(f), Florida Statutes, have been explained as follows:

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. An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if is not supported by facts or logic. An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding.

Lakeview Center, Inc. v. Agency for Health Care Admin., Case No. 06-3412BID, Fla. Div. Adm. Hear. LEXIS 571, at ¶ 44 (DOAH Dec. 6, 2006; AHCA Dec. 21, 2006) (citations omitted). Accord Syslogic Technology Services, supra.

37. EYA failed to meet its burden of proof. Even though the evidence establishes that COA letter provided by Daniel in its response to Part III did not meet the literal requirements of the RFP, the evidence fails to establish that DJJ's decision to award points to Daniel for those programs being accredited was arbitrary or capricious, clearly erroneous, or contrary to competition. It was not illogical or clearly erroneous for Mr. Hatcher to consider the letter to be satisfactory evidence of accreditation for those programs based upon his familiarity with

the services provided in the programs and the statement in the letter showing that Daniel was accredited for those services, particularly since the evidence establishes that COA generally accredits organizations and services, not programs. Moreover, there is no credible evidence that other prospective providers who included similar accreditation letters in their proposals were not afforded the same treatment as Daniel.

38. At most, the evidence calls into question whether the accreditation letter covers two of the three programs listed by Daniel in response to Part III because the services provided at those programs were not reviewed by COA at the site visit that led to the August 2006 letter submitted by Daniel as evidence of the accreditation of its programs. However, Dr. Shirk's testimony supports DJJ's decision to award points for those two programs, and even if those programs were not considered, Daniel's overall score would only be reduced by 20 points, to 580.13, and Daniel would still have the highest overall score.

39. This case is distinguishable from Eckerd Youth Alternatives, Inc. v. Department of Juvenile Justice and Daniel Memorial, Inc., Case No. 07-4610BID (DOAH Dec. 14, 2007), which involved a similar scoring dispute for RFP No. P2029. Unlike that case, sufficient evidence was presented in this case to support DJJ's award of points to Daniel for Part III of Attachment C.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that DJJ issue a final order dismissing the EYA's protest and awarding the contract for RFP No. P2032 to Daniel.

DONE AND ENTERED this 14th day of December, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
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 14th day of December, 2007.

ENDNOTES

^{1/} The record does not reflect the prices proposed by Daniel or EYA. The RFP states, at page 23, that "the prospective Provider that submits the lowest total price proposal shall receive 100 points [in the price category]. . . . All others will receive a score that is equal to 100 points minus the percentage difference above the lowest proposal." See Joint Exhibit 1, at 23 (emphasis in original). The evaluation summary for Daniel's proposal shows that Daniel received 100 points for cost/price, which means that Daniel proposed the lowest total price. See Joint Exhibit 4, at page 4. EYA received 99.83 points for cost/price, which means that the price proposed by EYA was only

0.17 percent higher than the price proposed by Daniel. See Joint Exhibit 3, at page 3.

^{2/} This finding is not inconsistent with the finding that wilderness programs operated by EYA have been accredited by COA because the evidence establishes that there is a specific COA standard for wilderness programs, whereas other COA standards relate to services. See Intervenor's Exhibit 2, at 18, 32-33.

^{3/} All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes.

COPIES FURNISHED:

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 32399-1300

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

Martha Harrell Chumbler, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

Cynthia S. Tunnickliff, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

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.