

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ECKERD YOUTH ALTERNATIVES,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 07-4610BID
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on November 9, 2007, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Tonja V. White, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the proposed award of the contract for Request for Proposals (RFP) No. P2029 to Henry and Rilla White

Youth Foundation, Inc. (White Foundation) is contrary to the specifications of the RFP.

PRELIMINARY STATEMENT

On June 18, 2007, the Department of Juvenile Justice (DJJ) posted notice of its intent to award the contract for RFP No. P2029 to White Foundation. Eckerd Youth Alternatives, Inc. (EYA), the second-ranked vendor, timely filed a notice of protest and a formal written protest with DJJ challenging the proposed award of the contract to White Foundation.

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 4, 2007.

The final hearing was scheduled for and held on November 9, 2007. No witnesses were presented at the hearing. EYA offered the deposition testimony of Paul Hatcher, which was received as Petitioner's Exhibit 1. Joint Exhibits 1 through 4 were also received into evidence.

No Transcript of the final hearing was filed. The parties requested and were given until November 21, 2007, to file proposed recommended orders (PROs), and thereby waived the deadline for this Recommended Order. See Fla. Admin. Code R.

28-106.216(2). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. DJJ issued RFP No. P2029 on April 17, 2007.
2. The RFP solicited proposals for a "240-available slot Community-based Intervention Services program for boys and girls for Volusia, Flagler and Putnam 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 \$1,504,968, and prospective providers were required to propose a price at or below that amount.
4. EYA and White Foundation submitted timely, responsive proposals in response to the RFP.
5. White Foundation's proposal offered a slightly lower price than EYA's proposal.¹
6. On June 18, 2007, DJJ posted notice of its intent to award the contract to White Foundation. Thereafter, EYA timely filed a notice of intent to protest and a formal written protest challenging the proposed award of the contract to White Foundation.

7. The RFP provided 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 White Foundation, the prospective provider operated DJJ-contracted non-residential programs in Florida. The proposal could receive up to 240 points for Attachment C, with a maximum of 40 points for Part III.

11. The RFP states that the proposal that receives the highest overall score will be awarded the contract.

12. White Foundation's proposal received a total of 785.98 points, which was the highest overall score. White Foundation's score included 40 points for Part III of Attachment C.

13. EYA's proposal received a total of 752.03 points, which was the second-highest overall score. EYA received zero points for Part III of Attachment C.

14. EYA contends that White Foundation should not have received any points for Part III, which would have resulted in White Foundation's overall score being 745.98 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 Rehabilitation Accreditation Commission (CARF). 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 the Council on Accreditation (COA), but its non-residential juvenile justice programs are not accredited by COA, CARF, or any other organization.

20. White Foundation listed four programs in its response to Part III of Attachment C: a conditional release program in Nassau County; a conditional release program in Duval County; a conditional release program in Clay County; and an Intensive Delinquency Diversion Services program in Circuit 2.

21. The documentation provided by White Foundation to show that the listed programs are accredited was an undated certificate from CARF and a one-page "Survey Accreditation Detail" dated June 28, 2006.

22. The CARF certificate states that "a three-year accreditation is awarded to the [White Foundation] for the following identified services: case management/services coordination: family services (children and adolescents)" and for "out-of-home treatment: family services (children and

adolescents)." The seal on the certificate includes an expiration date of August 2007.

23. The CARF certificate does not mention any of the programs listed by White Foundation in response to Part III of Attachment C. It only certifies that that White Foundation is accredited as an organization for certain services.

24. The Survey Accreditation Detail document makes reference to survey number 32190; company number 200190; an accreditation decision of "three-year accreditation"; an accreditation expiration date of August 31, 2007; and Correction Services of Florida, LLC as the "company submitting intent." The document lists six "companies with programs," including the four programs listed by White Foundation in its response to Part III of Attachment C.

25. The bottom of the Survey Accreditation Document includes the notation "page 1 of 2." The second page of the document is not included in the portion of White Foundation's response to the RFP that was received into evidence, nor is it included in the exhibit attached to the deposition of Paul Hatcher, the DJJ employee who evaluated the responses to the RFP with respect to Attachment C.

26. Mr. Hatcher testified that he interpreted the Survey Accreditation Detail document to be "a summary of the prospective provider's programs that received accreditation

based on the CARF award letter." That interpretation, while not implausible, is not adequately supported by the evidence of record.

27. First, there is nothing on the Survey Accreditation Detail document to demonstrate that it was prepared by CARF, and Mr. Hatcher acknowledged that he did not know who prepared the document.

28. Second, it cannot be determined from the Survey Accreditation Detail document whether the "three-year accreditation" referred to in the document relates to all of the "companies with programs" listed on the document, or just to Correction Services of Florida, LLC, which is identified as the "company submitting intent." Indeed, each of the listed "companies with programs" has a different six-digit number in parenthesis following its name and only the number following Correction Services of Florida, LLC, matches the "company number" referenced at the top of the Survey Accreditation Detail document.

29. Third, the record does not reflect the relationship, if any, between White Foundation and Correction Services of Florida, LLC. Indeed, Mr. Hatcher testified that he did not know anything about Correction Services of Florida, LLC, except that it appeared to have the same address as White Foundation.

30. The CARF certificate and the Survey Accreditation Detail document do not on their face reflect whether the listed programs are non-residential programs (as compared to residential programs) or whether they are juvenile justice programs (as compared to juvenile programs that do not involve the juvenile justice system). However, Mr. Hatcher testified that all of the services identified on the CARF certificate correspond to non-residential facilities and that he was familiar with the listed programs and knew that they were juvenile justice programs.

31. It cannot be determined from the CARF certificate and Survey Accreditation Detail document whether the four programs listed by White Foundation in its response to Part III of Attachment C are accredited. Indeed, Mr. Hatcher candidly acknowledged as much in his testimony.²

32. If DJJ had scored White Foundation's proposal in accordance with the specifications of the RFP, the proposal would have received zero points for Part III of Attachment C, which would have resulted in EYA's proposal receiving the highest overall score.

CONCLUSIONS OF LAW

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

34. EYA has standing to protest the proposed award of the contract to White Foundation 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).

35. 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)

36. 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.

37. 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, Inc. 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)).

38. 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, 2006 Fla. Div. Adm. Hear. LEXIS 571, at ¶ 44 (DOAH Dec. 6, 2006 AHCA Dec. 21, 2006) (citations omitted). Accord Syslogic Technology Services, supra.

39. EYA met its burden to prove that the proposed award of the contract to White foundation is contrary to the specifications of the RFP and that the proposed award is clearly erroneous. The supporting documentation provided by White Foundation in Part III of Attachment C -- i.e., the CARF

certificate and Survey Accreditation Detail document -- does not meet the requirements of the RFP, and the evidence presented at the final hearing does not adequately support Mr. Hatcher's decision to award White Foundation 40 points for Part III based upon those documents.

40. This case is distinguishable from Eckerd Youth Alternatives, Inc. v. Department of Juvenile Justice and Daniel Memorial, Inc., Case No. 07-4609BID (DOAH Dec. 14, 2007), which involved EYA a similar scoring dispute for RFP No. P2032, because sufficient evidence was presented to support DJJ's scoring of Part III of Attachment C in that case. Moreover, unlike that case, the accreditation documentation presented by White Foundation in this case raises more questions than it answers.

41. It is the responsibility of DJJ, not the undersigned, to determine whether to award the contract to EYA or to reject all bids and start over based upon the erroneous scoring of White Foundation's proposal. See Courtenay v. Dept. of Health & Rehabilitative Servs., 581 So. 2d 621, 623 (Fla. 5th DCA 1991) ("[I]t is not the hearing officer's function to reweigh the award factors and award the bid to the protestor. This is the prerogative of the department."). See also Procacci v. Dept. of Health & Rehabilitative Servs., 603 So. 2d 1299, 1300-01 (Fla.

1st DCA 1992); Moore v. Dept. of Health & Rehabilitative Servs.,
596 So. 2d 759, 761 (Fla. 1st DCA 1992).

RECOMMENDATION

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

RECOMMENDED that DJJ issue a final order rescinding the
proposed award of RFP No. P2029 to White Foundation.

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

S

T. KENT WETHERELL, II
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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 EYA or
White Foundation. The RFP states 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
page 23 (emphasis in original). The evaluation summary for
White Foundation's proposal shows that White Foundation received
100 points for cost/price, which means that White Foundation

proposed the lowest total price. See Joint Exhibit 4, at page 2. EYA received 99.88 points for cost/price, which means that the cost proposed by EYA was only 0.12 percent higher than the cost proposed by White Foundation. See Joint Exhibit 3, at page 2.

^{2/} See Petitioner's Exhibit 1 (deposition of Mr. Hatcher), at page 16:

Q Is there any way for you to determine whether the specific programs identified by the White Foundation obtained accreditation by CARF?

A The specific programs, no.

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

COPIES FURNISHED:

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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.