

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LABORATORY CORPORATION OF)
AMERICA,)
)
Petitioner,)
)
vs.) Case No. 08-0164BID
)
DEPARTMENT OF REVENUE,)
)
Respondent,)
)
and)
)
ORCHID CELLMARK, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 21 through 23, 2008, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

This case is a bid protest filed by Petitioner, Laboratory Corporation of America Holdings ("LabCorp"), to contest the award of a contract by Respondent, Department of Revenue ("Department"), to Intervenor, Orchid Cellmark, Inc ("Orchid" or sometimes "OCI"). The issues are whether the Orchid bid was responsive to the bid criteria, whether Orchid is a responsible bidder, and whether the Department's award of the bid to Orchid should be deemed clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

On or about August 31, 2007, the Department issued Request for Proposal No. 07/08-9 AD (the "RFP"). Four bids were received in response to the RFP, and a decision to award the contract to Orchid was published on December 4, 2007. LabCorp timely filed a protest with the Department, and a formal administrative hearing was conducted as set forth above.

At the final hearing, LabCorp's Exhibits 1 through 6, 24, 25, 27 through 35, and 42 were admitted into evidence. LabCorp called four witnesses: Laurie Neff, director of Customer Service for Orchid; Dr. Gary Stuhlmiller, director of DNA testing for LabCorp; Dr. George Maha, LabCorp laboratory director; and Lisa Hartley, business manager for LabCorp's DNA testing division. The Department Exhibits 1 through 6 were admitted into evidence. The Department called four witnesses: Harold Bankirer, deputy director of the Department's Child Support Enforcement (CSE) Program; John Kinneer, government analyst in the Department's Purchasing Office; Martin Ehlen, government operations consultant for the Department's CSE Program; and Carey Abney, CSE program administrator for the Department. Orchid Exhibits 1, 2, 5, 13, and 15 through 18 were admitted into evidence. Orchid called five witnesses: John Rader, Bid Response Team supervisor; Teresa Northrop; Anna Longuski, Orchid's director of Operations; Dr. Marco Scarpetta, manager of Orchid's Paternity Division and also its laboratory director; and Lori Neff. The parties also stipulated to 19 joint exhibits, each of which was admitted into evidence without objection.

The parties requested and were allowed 14 days from the filing of the transcript at DOAH to file proposed recommended orders. The Transcript was filed on May 9, 2008. Each party

timely filed Proposed Findings of Fact and Conclusions of Law, and each submission was duly considered in the rendering of this Recommended Order. Also, because a large portion of the testimony for consideration was presented in the form of deposition transcripts, the parties requested an opportunity to file objections concerning such testimony. To accommodate this request, the parties were allowed a period of ten days after filing of the proposed recommended orders in which to submit objections to any portions of the testimony relied upon by another party to support a finding of fact. Orchid timely filed objections to various portions of the deposition transcripts relied upon by Petitioner. A ruling on those objections is set forth below:

Objection No. 1: Orchid objects to the use of Dr. Scarpetta's deposition transcript on the basis that it is cumulative testimony. That objection could have been raised at the time the transcripts were offered into evidence at the final hearing. By not doing so, the objection is waived.

Objection No. 2: Orchid objects to three separate series of questions posed to Dr. Scarpetta during his deposition. However, no objections to those questions were raised when the deposition was taken. And, while it is true that Dr. Scarpetta did not use the word "inaccurate" in his description of the errors in Orchid's proposal, he did acknowledge (using other

language) that some of the wording was not completely accurate. The objection is denied.

Objection No. 3: Orchid objects to LabCorp's discussion of testimony by Ms. Longuski during her deposition. Again, Orchid did not object to the questions asked of Ms. Longuski at the time of the deposition. LabCorp's conclusion that Ms. Longuski knew that certain statements were inaccurate is correct. Whether Ms. Longuski saw the inaccurate statements during her review is not clear, however. The objection is denied, but the testimony at issue has little weight on which to base a finding of fact.

Objection Nos. 4, 5 and 6: Orchid objects to statements from Scott Edmonds' deposition transcript as calling for speculation and being irrelevant. Orchid did not object to the questions asked of Mr. Edmonds during his deposition. Once again, however, the testimony at issue is obviously speculative in nature and will not support a finding of fact. It does show Mr. Edmonds' state of mind during his review, but nothing more.

Objection No. 7: Orchid objects to statements from Mayra Levenson's deposition on the grounds that the question is compound, calls for speculation, and is vague and irrelevant. An objection to the form of the question was raised during the deposition. The objection is sustained.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, including the Joint Pre-Hearing Stipulation of the parties, the following Findings of Fact are made:

1. Petitioner, Laboratory Corporation of America Holdings, is a national testing laboratory with over 1,700 company-owned Patient Service Centers in the United States, including 176 in Florida. LabCorp has an existing contract with the State of Florida to provide Child Support Enforcement Genetic Testing Services in Department Regions 2, 3, 4 and 5, as well as Manatee County. These regions comprise the majority of the state. LabCorp has a longer history of providing paternity testing services using buccal swab collections (see discussion below) than any other party bidding on the RFP.

2. Intervenor, Orchid Cellmark, Inc., is also a long-time provider of genetic testing and has been providing genetic parentage testing services since 1979. Orchid currently has a contract with the Department to provide such services in two areas of the state: Department Region 1 (comprising essentially all of Florida panhandle) and Dade County. Orchid has experience providing parentage services to governmental entities, including the states of Ohio, Georgia and Michigan. In its services to the State of Florida, Orchid has tested over

20,000 cases involving over 53,000 samples; it had zero misreported results to the Department related to those cases.

3. Respondent, Department of Revenue, is the state agency responsible for the CSE program. CSE is one of six programs within the Department that interacts with clients on a one-to-one basis. The Department, unlike many state agencies, is organized using a business process model similar to the structure used in commercial and industrial sectors. Tasks and activities within the Department are aggregated from the bottom to the top, where the executive director is found.

4. CSE became a function of the Department in 1994, moving from the Department of Children and Families. The purpose of the move was to emphasize collection of funds and to change from a caseworker model to a business process model. As a result, cases within CSE are handled by different offices or persons depending on the nature of the activity being addressed within that particular case, as opposed to having the entire case handled by a single assigned caseworker.

5. CSE has five core processes: Case Management, Payment Processing and Fund Distribution, Child Support Aid, Establishment, and Compliance. CSE is organized into five geographic regions, each of which has service sites where CSE provides client services. One of the important services provided in these regions is genetic testing which is used to

establish paternity. Inasmuch as the Department does not have the personnel or wherewithal to perform genetic testing internally, that function is contracted out to established providers of such services.

6. CSE handles the establishment of the paternity process up to the point of genetic testing before allowing its contracted providers to perform the test. Once the test is completed, CSE continues with its duties concerning CSE. Each contracted provider of testing is responsible for the entire testing process: collecting specimens, transfer of specimens to a lab, maintaining chain of custody, conducting tests and reporting results to the Department. Further, each testing provider is responsible for seeing that a licensed phlebotomist is present to take the sample from the Department's client. Providers will not be paid if there are any failures during the testing process.

7. On or about August 31, 2007, the Department put out the RFP soliciting bids for genetic testing of clients and associated persons within the CSE program. The contract period runs from the contract execution date (or January 1, 2008, whichever is later) until June 30, 2011, plus three optional one-year renewals.

8. Bids from the following entities were received in response to the RFP: Orchid, Labcorp, Paternity Testing Corporation, and ReliaGene Technologies.^{1/}

9. Each of the four bids was reviewed upon submission to determine whether they were responsive to the bid criteria. Each was found to be responsive.

10. Thereafter, four Department employees designated as "evaluators," each reviewed the four bids (or proposals). The evaluators were: William Branch, Carey Abney, Mayra Levenson, and Scott Edmonds. The bids were scored pursuant to points assessed for each section of the RFP, as indicated in the table below:

Technical Response	Maximum Raw Score	Weight Factor	Maximum Points Possible
Understanding the Required Services	5	20	100
Methodology Used for Providing the Services	5	25	125
Management Plan for Providing the Services	5	15	75
Experience and Qualifications	5	20	100
Cost Response	5	50	250

11. Based upon these evaluation criteria, the four proposals were scored by the evaluators as follows:

LabCorp: Technical--306.25; Cost--250.00; Total--556.25

Orchid: Technical--368.75; Cost--241.94; Total--610.69

PTC: Technical--301.25; Cost--187.50; Total--488.75

ReliaGene: Technical--217.50; Cost--157.34; Total--374.84

12. LabCorp, whose cost proposal segment^{2/} was deemed superior to the other applicants, contests the total point assignment to Orchid on several bases. Each of those will be discussed below, but first a brief discussion of the underlying service in the contract: DNA testing.

DNA Testing Versus Genetic Testing

13. DNA testing for human identity first became available in the mid-to-late 1980s. DNA paternity testing began in approximately 1990. Early DNA paternity testing contracts bid out by various states required DNA testing to be performed on blood drawn from the putative parents and the child for whom paternity was to be established. However, as the science in this area improved, other testing methods became available. At the present time, Florida requires paternity testing to be done by way of polymerase chain reaction (PCR) technology.

14. PCR technology allows laboratories to perform DNA testing on a very small sample. This technology is utilized to evaluate human epithelial or "buccal" cells drawn from the inside of a person's cheek by use of buccal swabs. This process eliminates the need to draw venous blood from the subjects, expediting and easing the specimen collection process.

15. The purpose section of the RFP includes this language:

[CSE] is soliciting proposals for genetic testing services through this Request for Proposal for the purpose of conducting genetic testing services for the Department Program in child support cases throughout Florida. The Genetic Testing provided by the Provider is to conclusively determine the paternity of a child when paternity has not already been established. In certain circumstances in which paternity may have already been established, the court may order genetic tests in order to assist with its decision in a contested case.

16. The general instructions to the RFP include language relating to misstatements made by vendors. The RFP states:

All information provided by, and representations made by, the respondent are material and important and will be relied upon by the Buyer in awarding the Contract. Any misstatement shall be treated as fraudulent concealment from the Buyer of the true facts relating to submission of the bid. A misrepresentation shall be punished under law, including, but not limited to Chapter 817 of the Florida Statutes.

17. Chapter 817, Florida Statutes, relates to Fraudulent Practices, including issuing statements under false pretenses and fraud.

18. Relating to action that can be taken by the Department if a vendor submits a proposal with misstatements, Section 1.4.18 of the RFP states:

FDOR will reject all proposals that FDOR deems to have a material defect. A material defect is any part of the proposed solution that violates a mandatory requirement and

results in an unacceptable system or unacceptable risk.

FDOR will reject proposals that fail to pass the Selected Mandatory Items Compliance Evaluation.

19. Further, Paragraph 16 of the General Instructions to the RFP states:

Minor Irregularities/Right to Reject. The Buyer 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 Buyer determines that doing so will serve the State's best interests. The Buyer may reject any response not submitted in the manner specified by the solicitation documents.

20. With that backdrop, LabCorp maintains that Orchid provided false information in its bid proposal, thereby making the proposal non-responsive to the RFP. LabCorp's position is based on certain statements by Orchid concerning Orchid's history in the field of genetic testing.

Orchid's History of DNA Testing

21. Orchid, in its proposal, states, "Orchid Cellmark, Inc. (OCI), has been a leading provider of parentage and other family relationship DNA analysis since 1979, and is one of the largest providers of identity testing services in the world." It also states, "OCI has a history of providing the highest quality and most reliable DNA testing services identical to those outlined in this [RFP] for over 27 years." In actuality,

DNA testing has not been in existence since 1979, a fact Orchid freely conceded at final hearing.^{3/} Orchid actually intended its statement to suggest that Orchid had been involved in "genetic" testing since 1979; that is also a true fact and more accurately reflects Orchid's history.

22. None of the evaluators made any distinction between DNA testing versus genetic testing when reviewing the competing proposals. The phrase "DNA testing," in and of itself, does not appear to have been material or relevant to the assignment of scores by the evaluators under the scoring criteria.

23. LabCorp also contends that Orchid provided misleading information by claiming to own a large number of testing sites when, in fact, Orchid generally does not own testing sites that it utilizes.

Orchid's Network of Approved Sites

24. In its proposal, Orchid stated several times that it had a network of over 5,000 established, approved sites for specimen collections. That network has been developed by Orchid as it performed services under various contracts around the United States (and Great Britain). Orchid does not own or lease any of the sites. Nonetheless, Orchid's proposal states, "Currently, OCI provides secure and convenient specimen collection services at 127 of its own sites in addition to many Service Centers designated by the State." Orchid distinguishes

the phrases "own sites" from "owned sites" by saying that the former means a site used by them on a regular basis. This definition is supported by the attachment to Orchid's proposal which lists the various sites. That list includes not only state office buildings, but also hospitals and other health facilities. (In fact, Orchid lists as part of its 5,000 sites some sites actually owned by LabCorp.) It is clear Orchid is not claiming ownership of those places. Orchid's witnesses' testimony concerning this issue is credible.

25. There was no representation by Orchid that it had obtained state or other government approval for its intended collection sites. Rather, the sites were "approved" internally by Orchid, representing the fact that such sites had been used by Orchid previously and found to be sufficient for their purposes.

26. None of the evaluators based their scoring on whether Orchid owned or leased a collection site versus simply having access to them based on past relationships, nor did calling the sites "approved" sway the evaluators.

Failure of Orchid to Identify Subcontracted Phlebotomists

27. LabCorp also contends that Orchid failed to properly identify and provide information for all of its intended subcontract-phlebotomists.

28. The RFP, at section 2.5, states:

Subcontractors may be used to perform work under this Contract. If a proposer intends to use subcontractors, the proposer must identify in the proposal the following:

- (a) complete name of the subcontractor,
- (b) complete address of the subcontractor,
- (c) type of work the subcontractor will be performing,
- (d) percentage of work the subcontractor will be performing,
- (e) evidence that the subcontractor holds a valid business license,
- (f) a written statement, signed by each proposed subcontractor, that clearly verifies that the subcontractor is committed to render the services required by the Contract.

A proposer's failure to provide this information may cause the FDOR to consider their proposal non-responsive and reject it. The substitution of one subcontractor for another may be made only at the direction and prior written approval of the Contract Manager for the FDOR. Subcontractors of the Provider must adhere to the same level of qualifications and standards as required of the Provider.

29. LabCorp maintains that Orchid violated this provision of the RFP by failing to identify its phlebotomists as subcontractors and failing to provide all the required information about such subcontractors.

30. LabCorp does most of its collections and testing using its own employees. The company occasionally subcontracts with other vendors to provide some services. LabCorp, in its proposal, identified a subcontractor with whom it intended to do business under the contract with the State of Florida. All required information concerning that subcontractor was supplied to the Department in LabCorp's response.

31. Conversely, Orchid has no employees who do actual collecting of samples. Rather, Orchid relies on the services of persons and entities which operate independently of Orchid. Some of these independent collectors are located within the network of 5,000 sites addressed by Orchid in its proposal. The collectors for the contract at issue are yet to be named or will be contracted once the award has become final. This arrangement (using independent collectors for doing collections) has worked well for Orchid during its historical operations and particularly during its current contract with the State of Florida in Region 1 and Dade County. Orchid intends to use the same arrangement for collections under the contract currently in dispute.

32. Orchid has an agreement it utilizes when hiring third-party sample collectors. The agreement is part of the Collector Manual employed by Orchid and distributed to many of its collector sites.

33. In response to emails from the Department concerning its current contract with Orchid, Orchid was asked whether a certain collector was a subcontractor and, if so, to provide certain required information about that collector. In response, Orchid emailed the Department a list of collectors designated either as a "Business" or as an "Independent Contractor." Apparently Orchid's distinction between independent contractors and businesses is that individuals (real persons as opposed to business entities) are independent contractors. Since Orchid does not employ subcontractors, this list was submitted in response to the inquiry instead of a list of subcontractors (which it does not have).

34. The term "subcontractor" is not defined in the RFP. It is defined in Black's Law Dictionary as:

One who takes portion of a contract from principal contractor or another subcontractor. . . One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for the performance. . . One who takes from the principal or prime contractor a specific part of the work undertaken by the principal contractor.

35. Clearly, Orchid intends to allow some non-affiliated persons to perform some portions of the contracted work under the RFP. However, Orchid has always referred to such persons as independent contractors, as evidenced by its response to a

Department email in March 2007. In its email, the Department has asked Orchid whether a certain business entity (Accurate DNA of Northeast Florida) was Orchid's subcontractor. In response, Orchid provided a list of active specimen collectors that it utilized at that time. The list contained the requisite information (Federal ID number, address, name, etc.), but identified the entities as either businesses or independent contractors. The Department then thanked Orchid for providing "your list of subcontractors."

36. The RFP addresses phlebotomists a number of times. However, in only one section (5.1.2.2.5) does the RFP specifically address "sub-contracted phlebotomists." In that section, providers are directed to insure that both its phlebotomists and subcontracted phlebotomists maintain a professional appearance and demeanor while at a collection site.

37. It is impossible to distinguish the semantics in the discussion between Orchid and the Department on this issue to ascertain whether each was contemplating the same thing. Nonetheless, in the RFP at issue, Orchid did not provide a list of subcontractors, but the Department exercised its discretion and deemed the proposal responsive nonetheless.^{4/}

38. The Department intended to designate specific collection sites upon final award of the contract. Thereafter, the winning bidder would be expected to propose additional sites

as necessary to provide services to meet the needs of the Department. It is reasonable to presume that a bidder would not be able to list all of its intended phlebotomists at the time of the initial bid. And, the Department's deputy director for the CSE program testified that the Department did not presume or expect a vendor to list its intended phlebotomists.

39. In its review of proposals, the Department made a determination as to each bidder's qualifications and experience. It did not attempt to determine if one bidder was more qualified and experienced than another. Rather, it simply determined that a bidder had enough experience to carry out the terms of the contract. Both Orchid and LabCorp were found to meet the necessary experience threshold. A side-by-side comparison of the relative experience and qualifications of Orchid versus LabCorp was irrelevant to the award of the contract.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).^{5/}

41. Subsection 120.57(3)(f), Florida Statutes, provides in pertinent part:

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.

42. "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). In order to prove that an action is arbitrary, capricious, contrary to competition or clearly erroneous, the challenging party is held to a preponderance of the evidence standard. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988).

43. While Subsection 120.57(3)(f), Florida Statutes, describes the standard of review as de novo, for the purposes of a protest to a competitive procurement the courts have viewed the hearing as a "form of inter-agency review." State Contracting & Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (citing Intercontinental

Prop. Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992)). The object of a bid dispute is to evaluate the action taken by the agency based upon the information that was available to the agency at the time it took such action. § 120.57(1), Fla. Stat.

44. Both Orchid and LabCorp submitted responsive bids to the RFP which were reviewed by the Department. The review was done logically, with forethought and reason. The review was neither arbitrary nor capricious as carried out by the evaluators. Even though LabCorp interpreted the RFP to require a listing of all possible subcontracted phlebotomists, the fact that neither Orchid nor the other bidders did so, is not relevant. That fact alone did not make the bidding process contrary to competition. There is no evidence that LabCorp lost points or that Orchid gained points based on their different approaches to the RFP.

45. Within the context of its review of proposals, the Department is given the discretion to view projects as a whole and to waive or ignore minor irregularities. A minor irregularity is a variation from the bid invitation or proposal terms and conditions, which does not affect the price of the bid or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely affect the interests of the

governmental entity letting the bid. Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982).

46. Orchid's failure to provide a list of subcontracted phlebotomists in its proposal is, at worst, a minor irregularity to the RFP requirements. But based upon its explanation (i.e., that it did not have any subcontracted phlebotomists to identify), failure to provide the list does not even appear to be an irregularity. Inasmuch as the Department reviewers did not grant Orchid any special consideration or deny LabCorp consideration based on how each bidder addressed this topic, the issue is irrelevant. The Department did not act arbitrarily, capriciously or contrary to competition by deeming Orchid's proposal responsive to the RFP even without a list of subcontractors.

47. The erroneous statements by Orchid concerning "DNA testing" are clearly semantical and were not considered by the reviewers when grading the proposals. The statements do not constitute material misrepresentations. Orchid's witnesses' testimony concerning the absence of any intent to mislead the Department is credible. There was no fraud as contemplated in Chapter 817, Florida Statutes.

48. It has long been recognized that a bid containing a material variance is not acceptable. However, not every deviation from the invitation to bid is material. "[A

deviation] is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

"The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

49. In the present case, Respondent's acceptance of Orchid's bid was not based in any fashion on the supposed variations and erroneous statements. The testimony of the evaluators and decision makers is clear on that point.

50. Agencies enjoy 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 people might disagree. Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985). Capelletti Brothers, Inc. v State, Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). DOAH has a history of upholding an agency's decision if such action was within the realm of reasonableness. See, e.g., M/A

Corn, Inc. v Department of Management Services, State Technology Office, Case No. 04-1091BID (DOAH May 25, 2004); Hemophilia Health Services, Inc. v. Agency for Health Care Administration, Case No. 04-0017BID (DOAH No. April 29, 2004); Paul Sierra Construction, Inc. v. Southwest Fla. Water Management District, Case No. 02-3790BID (DOAH December 4, 2002); Just for Kids, Inc. v. Palm County School Board, Case No. 03-2168BID (DOAH November 7, 2003).

51. There is no evidence in the present case to suggest that the Department acted in any fashion other than honestly and fairly. The review of competing bids was carried out uniformly as it related to each bidder. The award of the contract to Orchid was based upon sound reasoning and rationale, as explained by each reviewer.

52. Both Orchid and LabCorp submitted clearly viable bids. Each was responsive and each was properly reviewed by the evaluators. Either entity could perform the terms of the contract, but the Department's decision to award Orchid, rather than LabCorp, is a matter of discretion and was supported by the facts. It was neither arbitrary, nor capricious, to select Orchid as the prevailing bidder. The decision was not contrary to competition. And nothing in the record indicates the decision was clearly erroneous, Orchid's minor mistakes notwithstanding.

53. 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. United States v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). The record in the present case does not support the contention that any mistake was made. Rather, despite some minor irregularities, the decision reached by all four evaluators seems reasonable.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Revenue upholding its award of the contract to Orchid.

DONE AND ENTERED this 13th day of June, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June, 2008.

ENDNOTES

1/ There is no dispute concerning timeliness of submission for the subject bids. Neither Paternity Testing Corporation nor ReliaGene protested the award of the bid to Orchid.

2/ For the cost proposals, LabCorp proposed \$90.00 per case for the entire term of the contract. Orchid proposed \$96.00 per case for the first three years of the contract, then \$90.00 per case for each successive year.

3/ See discussion in previous findings, above. Furthermore, the first DNA case took place in the United Kingdom in 1984 using a method called "multilocus probes," sometimes called a DNA fingerprint. This method of DNA analysis never became widely used and was replaced by the analysis of "single locus probes" or "variable number tandem repeats" (VNTR). These VNTRs were evaluated using the Restriction Fragment Length Polymorphism (RFLP) method. The RFLP method is also not commonly used any longer. Rather, both proposers in this case intend to utilize the polymerase chain reaction of short tandem repeats method to fulfill the contract requirements. This type of testing was first described in scientific literature about 16 years ago.

4/ Actually, LabCorp was the only vendor of the four that read the RFP to require a list of possible phlebotomists as subcontractors.

5/ Unless otherwise stated, all references to Florida Statutes shall be to the 2007 version.

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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.