

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEALTH MANAGEMENT SYSTEMS,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 08-2566BID
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent,)
)
and)
)
ACS STATE HEALTHCARE, LLC, AND)
MAXIMUS FINANCIAL SERVICES,)
INC.,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 17 and 18, 2008, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's proposed contract award for the Medicaid Third Party Liability Program, AHCA ITN 0805, is contrary to Respondent's governing statutes, Respondent's rules or policies, or the solicitation specifications.

PRELIMINARY STATEMENT

On April 28, 2008, Respondent, Agency for Health Care Administration (AHCA), posted its notice of intent to award the contract for Medicaid Third Party Liability (TPL) Program services to ACS State Healthcare, LLC (ACS). Petitioner, Health

Management Services, Inc. (HMS), timely filed a notice of intent to protest the award to ACS and filed a formal written protest on May 8, 2008.

The protest was forwarded to the Division of Administrative Hearings on May 23, 2008. ACS and MAXIMUS Financial Services, Inc. (MAXIMUS), petitioned to intervene in the proceeding, and their petitions were granted. On June 3, 2008, HMS filed HMS's Motion to Amend Formal Written Protest. On June 6, 2008, an Order was entered granting the motion to amend the protest, and the amended protest was deemed filed as of June 6, 2008. On June 12, 2008, HMS filed HMS's Second Motion for Leave to Amend Formal Written Protest Petition. The motion was granted by Order dated June 13, 2008, and the Second Amended Formal Written Protest Petition of Health Management Systems, Inc., was deemed filed as of the date of the Order.

At the final hearing, HMS called the following witnesses: Donna Price, Jennifer Barrett, and Ronald Singh. HMS's Exhibits 1 through 21 A through E; 23 A, B, and C; 24 A and B; and 26 through 38 were admitted in evidence. HMS's Exhibits 2 (Vol. 2), 3 (Vol. 2), 15, 24 B, and the exhibit to HMS's Deposition Exhibit 27 were admitted under seal. HMS's Exhibits 26 through 38 are the depositions of Michele Hudson, Phil Williams, Carlton Dyke Snipes, David Suhrweir, Cathy McEachron, Kay Newman, Daniel Roy, Jennifer Barrett, Pat

Ross, Alice Griffin, Melissa Lively, Cory White, and Chuck Cliburn.

At the final hearing, AHCA called the following witnesses: Jennifer Barrett, Kay Newman, and Cathy McEachron. ACS called Melissa Lively and Patrick Ross as witnesses. ACHA's and ACS's Joint Exhibits 5 through 9, 14, 15, 17, 23, 28, and 29 were admitted in evidence. ACHA's and ACS's Joint Exhibit 23 was admitted under seal. The parties were given leave to file objections to the deposition testimony after the final hearing.

On July 2, 2008, the four-volume Transcript of the final hearing was filed. On June 23, 2008, ACS filed objections to deposition testimony. On July 8, 2008, an Order was entered ruling on the objections to deposition testimony.

On July 9, 2008, the parties filed a Joint Motion Concerning Treatment of Confidential Information in Proposed Recommended Orders. On July 10, 2008, an Order was entered regarding the confidential information. The parties filed their proposed recommended orders on July 14, 2008. ACS and HMS filed second proposed recommended orders pursuant to the Order Regarding Confidential Information on July 16, 2008. The parties' proposed recommended orders have been given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. AHCA is the state agency responsible for administering the Medicaid Program in Florida. Medicaid is the state and federal partnership that provides health coverage for selected categories of people with low incomes.

2. AHCA's Division of Medicaid, TPL Unit, is responsible for identifying and recovering funds for claims paid by Medicaid for which a third party is liable.

3. The TPL Program is intended to implement the federal mandate that Medicaid be the payor of last resort. In this regard, as the state agency responsible for administering the federal Medicaid program, AHCA must take all reasonable measures before paying for medical services to ascertain whether a third party is liable for such services and should pay instead of Medicaid. In cases where a liable third party is not found until after Medicaid has already paid, AHCA is required to seek reimbursement from the third party for the costs paid by Medicaid. The TPL vendor is responsible for identifying potential third-party payors and recouping from them the costs that have been paid by Medicaid. Third parties include private insurance carriers, the Medicare program, estates, liability insurers, third-party administrators, pharmacy benefits managers, and any other individual, entity, or program that "may be, could be, should be, or has been liable for all or part of

the cost of medical services related to any medical assistance covered by Medicaid." § 409.901(26), Fla. Stat. (2007).¹

4. AHCA's TPL functions are outsourced, and HMS is the incumbent vendor.

5. On January 22, 2008, AHCA issued an invitation to negotiate (ITN) for the purpose of selecting a vendor to provide TPL program services. The scope of the services consists of eight components: (a) casualty recovery, (b) estate recovery, (3) trust and annuity recovery, (4) Medicare and other third-party payor recovery, (5) cost avoidance, (6) Medicaid Reform Opt Out Program, (7) Health Insurance Premium Payment Program, and (8) other recovery programs. The selected vendor would be paid a combination contingency fee and fixed fee based on rates offered by the vendor.

6. The ITN established a two-step process for selecting a vendor with which to contract: the evaluation phase and the negotiation phase. In the evaluation phase, each vendor was required to submit a reply to the ITN containing its technical proposal and price proposal for the services identified in the ITN. A total of 980 points was available in a variety of categories.

7. The vendor responses were to be evaluated and scored based on detailed criteria set forth in the ITN. The ITN includes the following statement:

Each evaluator will calculate a total score for each response. The Issuing Officer will use the total point scores to rank the responses by evaluator (response with the highest number of points = 1, second highest = 2, etc.). The Chairman will then calculate an average rank for each response for evaluators. The Agency will negotiate with the three highest ranked vendors.

8. The purpose of the scoring was to determine which vendors would participate in the negotiations. The scoring did not determine which vendor would be awarded the contract. The award of the contract would be based on the vendors' presentations during the negotiation phase. The ITN did not set forth evaluation criteria that would be used in the negotiation phase. The criteria in Attachment E of the ITN pertained to the criteria that would be used to determine the responsive and responsible vendors with whom AHCA would negotiate, and, to that extent, the criteria in Attachment E were relevant to the negotiation phase of the procurement process. No vendor objected to the specifications contained in the ITN.

9. The ITN provided a deadline for the vendors to submit questions regarding the ITN and stated:

The Agency will receive all questions pertaining to this solicitation no later than the date and time specified for written inquiries in Section C.6, Solicitation Timeline. All inquiries must be made in writing to the Issuing Officer identified in Section C.5. Questions may be sent by US Mail, email, fax or hand delivered. (Email is preferred and encouraged.) **No telephone**

calls will be accepted. No questions, written or otherwise, will be accepted except as indicated in Section C.6, Solicitation Timeline. The Agency's response to questions received will be posted as an addendum to this solicitation as specified in Section C.6, Solicitation Timeline. (Emphasis in original)

The timeline contained in the ITN set February 4, 2008, as the deadline for receipt of written inquiries from the vendors.

10. The ITN set March 6, 2008, as the deadline for receiving responses to the ITN from the vendors. On February 12, 2008, a vendors' conference was held to allow the vendors to ask questions concerning the ITN. Representatives from ACS, MAXIMUS, and HMS attended the conference. During the vendors' conference, AHCA personnel stated that if the vendors had additional inquiries concerning the ITN that the inquiries should be directed to the procurement office.

11. The ITN provided that AHCA would accept oral questions during the vendors' conference and that AHCA would "make a reasonable effort to provide answers to oral questions" at the vendors' conference. The ITN also provided: "[O]ral answers and discussions are not binding on the agency. Only those communications, which are in writing from the Agency, may be considered as duly authorized expressions on behalf of the State."

12. The ITN solicitation timeline indicated that the anticipated date for AHCA's responses to the vendors' written inquiries would be February 22, 2008.

13. On February 13, 2008, Jeannine Zibilich from ACS sent an e-mail to Cathy McEachron with the following inquiry:

Given the significant number of questions asked and the anticipated date for the responses, ACS respectfully requests that the proposal due date for ITN 0805, Florida Medicaid Third Party Liability Program, be extended to March 28, 2007 [sic]. We thank you for your prompt consideration of this request and look forward to an answer at your earliest convenience.

14. Ms. McEachron forwarded the e-mail to Jennifer Barrett who is the AHCA administrator within the Division of Medicaid, TPL unit. Ms. McEachron and Ms. Barrett agreed that the March 28 date was too much of an extension, but agreed that the deadline for submitting the responses to the ITN could be extended to March 14, 2008.

15. On February 14, 2008, AHCA provided written responses to the inquiries made by the vendors. The written responses were published as part of Addendum No. 1 of the ITN. The verbal directive allowing additional inquiries after February 4, 2008, which changed the timeline in the original ITN, was not published as an addendum to the ITN.² Addendum No. 1 also changed the deadline for submitting responses to the ITN to March 14, 2008.

16. HMS claims that ACS received a benefit from the extension of the time frame for submitting responses to the ITN and that HMS did not receive a benefit because it did not need additional time to submit a response. The extension of time to submit responses to the ITN benefited all vendors. Each vendor had additional time to prepare and submit a better response to the ITN.

17. On February 26, 2008, Chuck Cliburn from ACS sent e-mails to Ms. McEachron requesting additional information concerning claims paid, the number of members for managed care and fee for service, and the total benefits paid for the current casualty cases. Ms. McEachron forwarded the e-mail to Ms. Barrett with the following notation:

Hey. We've received one more question on the TPL solicitation. Since it is after the question and answer period, technically, we don't have to answer it. Keep in mind, however, the more information the vendors have, the better their responses will be. If we have this info readily available, I'd recommend providing it. If you decide to, I will post it to VBS as addendum number 2.

18. Ms. Barrett advised Ms. McEachron that the information was not readily available, but that some information could be accessed on a website, and provided Ms. McEachron the website link. Ms. McEachron issued Addendum No. 2 on March 3, 2008, providing the website link to the vendors. The information requested by ACS was provided to all vendors. HMS claims that

it did not have the advantage of being able to ask questions after the ITN deadline. The only question identified by HMS that it would have asked after the deadline was answered at the vendors' conference.

19. The ITN required that contact with the procurement officer by the vendors was to be done in writing. Ms. McEachron lifted the restriction on written responses by allowing the vendors to make telephone calls with general inquiries such as asking whether their proposals had been received or complaining that the AHCA website was unavailable. The use of telephone calls for general inquiries applied to all vendors.

20. AHCA Deputy Secretary Carlton Dyke Snipes appointed three evaluators to independently score most aspects of the responses. An additional individual was appointed to evaluate financial stability. Another individual was asked to award points for past performance. Points for the cost element of the responses were awarded by the ITN's issuing officer.

21. Three vendors submitted responses to the ITN: HMS, ACS, and MAXIMUS. AHCA determined that MAXIMUS' response was not responsive to the ITN.

22. Both ACS and HMS are wholly-owned subsidiaries. The parent company for ACS is Affiliated Computer Services, and the parent company for HMS is HMS Holdings Corp.

23. The ITN provides that the vendors were to submit their most recent financial information with their response. The information could be submitted as either the most recent financial statement or the most recent audit. Both ACS and HMS submitted the annual reports on the Form 10-K for their parent companies. AHCA customarily accepts the financial information for the parent company for evaluation of vendor responses.

24. The Form 10-K submitted by HMS contained a note that provided financial information directly related to HMS. The Form 10-K submitted by ACS did not contain specific financial information about ACS. Affiliated Computer Services is a larger company than HMS Holdings Corp.³ Because Affiliated Computer Services is such a large company, the financial information for ACS would not be reported separately as was the information relating to HMS.

25. Both ACS and HMS were evaluated based on their parent companies' financial capability. ACS received a score of five in the evaluation of the financial information it submitted. A score of five meant that ACS was considered to have excellent financial capabilities. HMS received a score of four on its financial information. A score of four meant that ACS had above average financial capability.

26. The ITN required the vendors to list the subcontractors that they intended to use. If a vendor was going

to use a sister corporation as subcontractor, AHCA did not require that the sister corporation be listed and so advised the vendors during the vendors' conference.

27. ACS Recovery Services, Inc., and ACS Commercial Solutions, Inc., operate within ACS Commercial Solutions Group, which is a line of business of Affiliated Computer Services, Inc. ACS; ACS Commercial Solutions, Inc.; and ACS Recovery Services, Inc., are considered by ACS to be sister corporations, but are separate corporate entities.

28. ACS intends to use its sister corporations to perform many of the services offered in ACS's reply to the ITN. The reply states that the services will be provided by the sister corporations, but does not list the sister corporations as subcontractors. ACS will not actually enter into a subcontract with its sister corporations.

29. The responses submitted by HMS and ACS were evaluated, and HMS received the highest number of points and, thus, was ranked number one.

30. On March 25, 2008, AHCA sent letters to both ACS and HMS advising them that they had been selected as candidates for negotiations and providing dates that were available for the negotiation sessions. Each letter stated: "The negotiation and selection process will consider each company's ability to meet

or exceed the business, technical, and financial requirements of the Agency."

31. The ACS negotiation was scheduled for April 7, 2008, and the HMS negotiation was scheduled for April 8, 2008. On April 3, 2008, confirmation letters were sent to ACS and HMS, confirming the scheduled negotiation dates and times. The letters directed each vendor to "plan to provide handout materials for four (4) AHCA team members." Each letter also included a "list of topics to be discussed." The topics were based on the information provided in each vendor's response to the ITN.

32. ACS provided AHCA with copies of their written responses to topics listed in its confirmation letter prior to the commencement of the negotiation session. Ms. Barrett received a copy of the written responses on the morning of the negotiation session with ACS and had time to quickly read the materials prior to the negotiation session. HMS did not provide advance copies of their written responses, and the negotiators received HMS's materials at the negotiation session. Neither ACS nor HMS was advised, prior to the negotiations, whether it was permissible to provide AHCA with advance copies of the written responses or other handout materials. Ms. Barrett reviewed both vendors' written responses after the negotiation sessions.

33. Each negotiation session was conducted by Ms. McEachron, the director of AHCA's Procurement Office and the issuing officer for the ITN. David Suhrweir and Daniel Roy, two of the three evaluators, were also designated as negotiators. Ms. Barrett, the AHCA TPL contract manager, was also a negotiator. Ms. Barrett had been listed as client reference by HMS because Ms. Barrett was the contract manager for the current contract with HMS for TPL services. With the exception of Ms. McEachron, at the time of the negotiations, the negotiators were unaware of the total scores received by HMS and ACS during the evaluation of their responses. Ms. McEachron did not inform the other negotiators of the evaluation scores prior to negotiations to prevent any bias towards the vendors based on the scores they received during the evaluation phase. The negotiation sessions were transcribed by a court reporter.

34. Each negotiation session was scheduled to last for two hours and ACHA's decision to award a contract was to be based on the information that was provided during the negotiation sessions. At the beginning of each negotiation session, the vendors were informed that any topic was open for discussion during the negotiation.

35. HMS had submitted a lower cost proposal than ACS. Prior to the commencement of the negotiations, Ms. Barrett sent an e-mail to Ms. McEachron inquiring whether price could be

negotiated during the negotiation sessions. Ms. McEachron advised Ms. Barrett that price was open for discussion. Ms. Barrett wanted to negotiate price with ACS to see if AHCA could get a lower price. Because HMS had the lower prices, she did not intend to bring up the subject of price with HMS, but felt that HMS was not precluded from negotiating a lower price.

36. During the negotiation with ACS, Ms. Barrett asked ACS whether it would lower its prices and stated:

I will ask the all important question . . . In reference to the cost proposal, is there any chance that ACS would be willing to reduce some of their costs they are proposing? . . . It's mainly in the area of the cost avoidance per policy. And then the opt out, there is a wide difference in the amount that was proposed in costs in those three areas.

Ms. McEachron gave ACS until the end of the week to come up with a best and final offer for prices. The end of the week would have been April 11.

37. The negotiators were more impressed with the presentation by ACS than the presentation by HMS. ACS was more organized and well-prepared than HMS. To the negotiators, HMS appeared to be disjointed, flustered, and confused.

38. A 2006 United States Supreme Court decision, Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006), limited Medicaid liens to the medical portion of recoveries in casualty cases, and ACS proposed to address the

impact of the decision by taking a proactive approach and work with the attorneys on the cases prior to the cases going to trial or settlement. HMS claims that ACS misrepresented its success in dealing with the Ahlborn decision by stating that ACS had successfully argued the Ahlborn issue in Florida courts.

39. During the negotiations, Melissa Lively, an attorney for ACS, indicated that ACS had success in working with the attorneys for the Medicaid clients by discussing the Ahlborn decision during the early stages of litigation. As a result of ACS's proactive approach, ACS had been successful in its recoveries.

40. Following each of the negotiation sessions, the negotiators spoke together briefly to share their general impressions and thoughts of the negotiation. Later in the afternoon following the last negotiation, Ms. Barrett, Mr. Roy, and Mr. Suhrweir again met to further discuss their impressions of the two vendors based on the negotiation sessions. The three negotiators jointly and unanimously agreed to recommend to AHCA's senior management that ACS be awarded the contract.

41. Ms. Barrett drafted a memorandum recommending that the contract be awarded to ACS and, on April 9, 2008, provided the memorandum to Mr. Roy and Mr. Suhrweir for their review and comments. The memorandum listed the following as "items [that] are representative of issues ACS presented to the Agency during

the negotiations that provides a justification for this recommendation”:

Case Tracking System - The case tracking system for casualty, estate, trusts, and annuities demonstrated by ACS currently has the capability to automatically relate and unrelate claims based upon injuries. This feature will eliminate some of the manual processes in identifying claims that are related to a Medicaid recipient's accident or incident. The system also automatically generates letters with an electronic signature that go directly to ACS's mail operations.

Ahlborn Supreme Court decision - ACS indicated it will take a proactive approach and become involved with attorneys in the beginning of a case to ensure the Medicaid lien amount is included in the total settlement amount, thus preventing a hearing. ACS advised it would conduct outreach regarding the Ahlborn decision in order to educate attorneys on Medicaid's rights to recovery.

Quality control - ACS proposes using the Report Card process for quality control. ACS has identified a full-time quality staff person as required by the ITN. ACS demonstrated a clear understanding of the importance of quality control in all areas of the contract.

Cost Avoidance - ACS has presented an innovative approach to cost avoidance data. Through its Smart TPL and MEVSNET systems, real time cost avoidance is provided thereby potentially increasing cost avoidance and carrier billing collections.

Innovation - ACS has presented innovative approaches to increasing recoveries. For example, ACS will review the dates of death of Medicaid recipients and file a Caveat by

Creditor in the deceased recipient's county of residency. The clerk of the Court will then be required to provide a Notice of Summary Administration and ACS would file an estate claim on behalf of the Agency.

42. By e-mail dated April 10, 2008, ACS notified Ms. McEachron that ACS would revise its pricing. In its original pricing ACS's proposed prices were higher than HMS's prices in three of the four categories. ACS's revised prices were higher than HMS's prices in two of the four categories. The negotiators had made a decision to recommend the contract award to ACS prior to receiving the revised pricing, and the revised pricing was not determinative of the recommendation to award to ACS.

43. The negotiators' recommendation was presented to management of AHCA's Division of Medicaid. The deputy secretary for Medicaid considered the recommendation and directed the award of the contract to ACS.

44. On April 28, 2008, AHCA posted a notice listing the scores and rankings for both HMS and ACS. The notice announced the agency's intent to award the contract to ACS.

45. Prior to the award of a contract, the procurement office maintains a solicitation file, which contains the documents relating to the solicitation process. After the award of a contract, the procurement office will create a contract file, which contains certain information required by Subsection

287.057(3)(b), Florida Statutes. In the instant case, the contract award has not been made, and, therefore, the contract file has not been created.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

47. Petitioner challenged the contract award to ACS pursuant to Subsection 120.57(3), Florida Statutes, which provides:

In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, the proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is

illegal, arbitrary, dishonest, or fraudulent.

48. Agency action will be found to be "clearly erroneous" if it is without rational support and, consequently, the trier-of-fact has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

49. An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which are:

To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

50. "An action is 'arbitrary if it is not supported by logic or the necessary facts,' and 'capricious if it is adopted without thought or reason or is irrational.'" Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006).

51. In its Second Amended Formal Written Protest Petition, HMS alleges the following grounds for protesting the intended contract award:

[T]he "negotiations" conducted with the vendors were anti-competitive, fundamentally unfair, and contrary to Chapter 287, Florida Statutes, and AHCA ITN 0805 because ACS was given the opportunity to revise its cost proposal through a "best and final offer" and HMS was given no such opportunity.

[T]he "negotiations" conducted by AHCA with the vendors were contrary to the specifications in the ITN, which established detailed evaluation and scoring criteria. Both ACS and HMS were scored pursuant to the ITN's criteria, and HMS was awarded many more points than ACS by each evaluator. . . . Nothing occurred in the evaluations that would have provided a rational basis for ignoring the evaluator's scores and substituted a different decision by proposing to award the contract to ACS.

AHCA's recommendation of award to ACS is contrary to the specifications of the ITN, given that HMS scored higher than ACS on the issues that AHCA identified as "a justification" for its proposed award to ACS, and ACS proposed no changes to its offer that could have prompted a rational reversal of AHCA's initial appraisal of those issues either during or after the negotiations.

AHCA's recommendation to award to ACS is contrary to [S]ection 287.057(3)(b), Florida Statutes, which provides that "[t]he contract file must contain a short plain statement that explains the basis for vendor selection and that sets forth the vendor's deliverables and price, pursuant to the contract, with an explanation of how these deliverables and price provide the best value to the state."

The negotiation process was anti-competitive, fundamentally unfair, contrary to [C]hapter 287, Florida Statutes, and in violation of the ITN because AHCA engaged in

meaningful negotiations with only one vendor (ACS), but declined to engage in meaningful, good faith negotiations with the vendor (HMS)

[T]he recommended contract award to ACS was clearly erroneous, arbitrary and capricious, and contrary to [C]hapter 287, Florida Statutes, and the ITN specifications to the extent that it was based on the recommendations of two evaluators who had judged the proposals of ACS to be inferior to that of HMS.

[T]he ACS proposal is nonresponsive because it fails to include the requisite number of client references reflecting projects for services similar in nature to those described in the ITN.^[4]

AHCA impermissibly disclosed information relating to HMS's proposed costs to ACS thereby giving ACS an unfair competitive advantage during the negotiation phase of the ITN process.

[I]t was an impermissible conflict of interest for Jennifer Barrett to serve as a client reference for HMS in addition to serving as the primary negotiator under the ITN, and . . . Ms. Barrett gave undue weight to her own client reference evaluation and scores in recommending the award of the contract to ACS.

[I]n serving as a negotiator Jennifer Barrett impermissibly based her decision on matters outside of HMS's proposal and not otherwise submitted as part of the ITN process, as reflected in Ms. Barrett's notes relating to the negotiations.

[I]n serving as a negotiator Jennifer Barrett impermissibly based her award recommendation on her own criteria rather than on the criteria in the ITN, as

reflected in Ms. Barrett's notes relating to the negotiation.

[T]he AHCA negotiators violated the ITN and Chapter 287 by negotiating a contract with ACS and then recommending the award of the contract to ACS without first scoring or ranking the respective responses based on the criteria in the ITN, or without taking into account or even knowing how the evaluators scored or ranked the respective responses based on the ITN criteria.

[T]he ACS proposal is non-responsive because it fails to include financial information relating to the vendor as required by the ITN.

[T]he ACS proposal is non-responsive where ACS is proposing to perform the contract in partnership with ACS Commercial Solutions Group ("CSG"), which "will perform many of the services" offered in the ACS proposal, but CSG was not named in the ACS proposal as one of the vendors or a subcontractor, and did not meet any of the requirements in the ITN relating to vendors or subcontractors.

Cathy McEachron violated [S]ection 287.057(24), Florida Statutes, and the ITN specifications by lifting the restrictions on telephone contacts by inviting the vendors to call her before the expiration of the 72-hour period following the posting of the proposed award.

ACS received an unfair competitive advantage in violation of ITN Sections C.8 and C.9 when ACS submitted written inquiries to AHCA after the February 4, 2008 deadline for receipt of written inquiries specified in Section C.6.

ACS received an unfair competitive advantage when ACS submitted written responses to the negotiation subjects identified by AHCA

nearly five hours before ACS' April 7, 2008[,] negotiation meeting with AHCA . . .

ACS presented misleading and false information in its proposal and in the negotiations in violation of the ITN specifications. . . . In misleading the agency with respect to the success of its approach to Ahlborn, ACS obtained an unfair competitive advantage.

52. Subsection 287.057(3), Florida Statutes, authorizes the use of an ITN and provides:

(3)(a) If the agency determines in writing that the use of an invitation to bid or a request for proposals will not result in the best value to the state, the agency may procure commodities and contractual services by competitive sealed replies. The agency's written determination must specify reasons that explain why negotiation may be necessary in order for the state to achieve the best value and must be approved in writing by the agency head or his or her designee prior to the advertisement of an invitation to negotiate. An invitation to negotiate shall be made available to all vendors simultaneously and must include a statement of the commodities or contractual services sought; the time and date for the receipt of replies and of the public opening; and all terms and conditions applicable to the procurement, including the criteria to be used in determining the acceptability of the reply. If the agency contemplates renewal of the contract, that fact must be stated in the invitation to negotiate. The reply shall include the price for each year for which the contract may be renewed.

(b) The agency shall evaluate and rank responsive replies against all evaluation criteria set forth in the invitation to negotiate and shall select, based on the

ranking, one or more vendors with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state. The contract file must contain a short plain statement that explains the basis for vendor selection and that sets forth the vendor's deliverables and price, pursuant to the contract, with an explanation of how these deliverables and price provide the best value to the state.

53. Best value is defined by statute and means "the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." § 287.012 (4), Fla. Stat. In the letter inviting the vendors to negotiate, AHCA stated that "[t]he negotiation and selection process will consider each company's ability to meet or exceed the business, technical and financial requirements of the Agency."

54. In several of its allegations, HMS essentially argues that the contract award to ACS was contrary to Chapter 287, Florida Statutes, because HMS received the highest score during the evaluation phase of the procurement. HMS's argument is without merit. AHCA conducted the procurement of the services for the TPL Program in accordance with Subsection 287.057(3), Florida Statutes. An ITN was developed to determine which vendors would participate in the negotiations. Based on the criteria in the ITN the vendors were evaluated and ranked. In

the instant case, the ITN provided that negotiations would be held with the three highest ranking vendors. Because only two vendors were deemed responsive to the ITN, negotiations were limited to those two vendors, HMS and ACS.

55. Subsection 287.057(3), Florida Statutes, requires that the procuring agency award the contract based on the negotiations to the responsive and responsible vendor who provides the best value to the state. The evaluation criteria in the ITN was used to determine which vendors are responsive and responsible by meeting the criteria established in the ITN and which vendors will participate in the negotiation process. In determining the best value to the state during the negotiation phase, the agency is not limited to the criteria that are used to determine who will participate in the negotiations. If that were so, there would be no need to use an ITN; a request for proposals would suffice. The idea behind negotiating with vendors is to cut the best deal for the state. Negotiation allows the vendors to lower their prices or offer additional or enhanced services during the negotiation process. The use of negotiation does not mean that the vendor who scored the highest during the evaluation phase will be awarded the contract. Therefore, contrary to HMS's assertion, it is immaterial whether prior to the negotiations that all the

evaluators were informed of the rankings of the vendors based on the evaluation phase of the procurement.

56. The proposed award will not be overturned so long as the decision is based on an honest exercise of discretion. Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991). "Absent a showing that Respondent . . . was not engaged in an honest exercise to obtain the best value for the state, Respondent . . . was free to use whatever criteria in the negotiation phase that it chose." M/A-Com, Inc., v. Dept. of Management Services, Case No. 04-1091BID (DOAH May 25, 2004). AHCA's actions in the procurement of TPL services demonstrate a honest exercise to obtain the best value for the state.

57. HMS alleges that the recommended award was contrary to Subsection 287.057(3)(b), Florida Statutes, which provides that certain information be placed in the contract file. This allegation is without merit. AHCA currently maintains a solicitation file, and the contract file will be created after the contract is awarded. Nothing in Subsection 287.057(3)(b), Florida Statutes, requires that the contract file be created before the contract is awarded. Until the contract file is created, AHCA is not required to place the required information in a contract file.

58. HMS alleges that ACS failed to include financial information with its reply to the ITN. This allegation is without merit. Both HMS and ACS are wholly owned subsidiaries, and both vendors submitted the Form 10-K for their parent corporations. AHCA customarily accepts Form 10-Ks of parent companies for the financial evaluation of their subsidiaries. Both HMS and ACS were evaluated based on the information of their parent companies; thus, both vendors were treated the same in evaluating their financial submissions. The reliance by AHCA on the financial information of the parent company is neither arbitrary nor capricious, it is not clearly erroneous, it is not anti-competitive, and it does violate any statute governing AHCA, any policy or rule of AHCA, or the specifications of the ITN.

59. HMS alleges that during the negotiations that AHCA impermissibly disclosed information related to HMS's cost proposal to ACS. Nothing in the ITN, the statutes governing the procurement, and AHCA's policies or rules prohibits AHCA from disclosing to ACS information concerning HMS's cost proposal during the negotiation phase. The object of the negotiations is to get the best value for the state, which could include getting a lower price if possible. Thus, it was reasonable and logical that AHCA would ask ACS if it would lower its prices. Additionally, the recommendation to award to ACS was determined

prior to ACS's submission of its revised prices so that the revision to prices did not give ACS a competitive advantage over HMS.

60. HMS alleges that the negotiations were anti-competitive because HMS was not given an opportunity to revise its cost proposal, and AHCA engaged in meaningful negotiations with ACS and not with HMS. This allegation is also without merit. During the negotiations, the vendors were advised that everything was up for discussion. If HMS had desired to lower its prices, there was nothing which prevented it from doing so. The direct request to ACS concerning its price was not anti-competitive.

61. HMS alleges that ACS presented misleading and false information during the negotiation phase concerning the success of ACS's approach to the Ahlborn decision. ACS did not make misleading or false statements concerning its approach to the Ahlborn decision. It is clear from reading the transcript of the negotiation session with ACS that ACS was making the point that it had success on the Ahlborn issue by taking a proactive approach with the attorneys who represented the Medicaid recipients in the early stages of the litigation rather than trying to deal with the recovery after the casualty case went to trial or a settlement was reached.

62. HMS alleges that ACS received an unfair competitive advantage when it submitted written responses to the topics identified in ACHA's confirmation letter of April 3, 2008, prior to the beginning of the negotiations. Nothing in the confirmation letter or the ITN prohibited the vendors from submitting their written responses prior to the commencement of the negotiations. While Ms. Barrett may have quickly reviewed ACS's written responses prior to the commencement of the negotiations, she thoroughly reviewed the responses of both vendors after the negotiation session. ACS did not receive an unfair competitive advantage.

63. HMS alleges that ACS received an unfair competitive advantage by submitting written inquiries to AHCA after the February 4, 2008, deadline set forth in the ITN. The first inquiry was to extend the time for filing replies to the ITN. The time for filing replies to the ITN was extended for eight days, less than requested by ACS, and the time frame was amended in the first addendum to the ITN. The vendors had been told at the vendors' conference that they could submit inquiries after the February 4 deadline. However, this extension was not published as part of any addendum to the ITN. Technically, because the extension was not published as an addendum to the ITN, the vendors should not have relied upon the oral representation made by AHCA at the vendors' conference.

However, the extension of time that was granted was given to all vendors and was published as part of an addendum to the ITN. ACS did not receive an advantage not enjoyed by the other vendors.

64. HMS alleged that ACS received an unfair competitive advantage by submitting a written inquiry after the February 4, 2008, deadline for submission of written inquiries. ACS sent an e-mail to Ms. McEachron asking about the number of claims paid, the number of members for managed care and fee for service, and the total benefits paid for current casualty cases. Although, the inquiry was past the deadline for written inquiries, AHCA decided to respond in hopes of getting better responses from the vendors. Again, the information was provided to all vendors through the publication of the second addendum to the ITN. ACS did not receive an unfair competitive advantage.

65. HMS alleges that ACS was not responsive to the ITN because it did not list ACS Commercial Solutions Group as a subcontractor. ACS was not required to list its sister corporation as a subcontractor, and ACS's reply to the ITN made it clear that sister corporations would be providing some of the services. ACS was responsive to the ITN.

66. HMS alleges that it was a conflict for Ms. Barrett to serve as a primary negotiator when she was a client reference for HMS's past performance portion of HMS's reply to the ITN.

This claim is without merit. Subsection 297.057(17)(b), Florida Statutes, requires that the negotiators collectively have "experience and knowledge in . . . the program areas and service requirements" for the services that are sought. Obviously, the requirement for this experience and knowledge is so that the negotiators can apply their expertise during the negotiation phase to get the best value for the state. Ms. Barrett has experience and knowledge in the program areas and services requirement for the TPL program. As contract manager for the contract, it is logical that she would be one of the negotiators.

67. HMS alleges that Ms. Barrett impermissibly based her contract award recommendation on matters outside HMS's proposal and on criteria not reflected in the ITN. As discussed above, the evaluation criteria in the ITN did not determine the vendor to whom the contract would be awarded. The evaluation criteria were used to determine which vendors were responsive and responsible and were eligible to participate in the negotiation phase. Ms. Barrett's recommendation to award to ACS was based on the negotiations. In determining which vendor to recommend the award of the contract, she was free to consider her experience as contract manager for the current contract.

68. HMS alleges that Ms. McEachron violated Subsection 287.057(24), Florida Statutes, which provides:

Each solicitation for the procurement of commodities or contractual services shall include the following provision:

"Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

As the procurement officer, Ms. McEachron allowed the vendors to call her by telephone between the release of the solicitation and the end of the 72-hour period following the agency posting of the intended award. The telephone calls would be general in nature such as whether a vendor's proposal had been received or inquiring about the unavailability of AHCA's website. The inquiries did not affect the substance of the solicitation or give any particular vendor an unfair advantage. Allowing the use of the telephone rather than requiring written inquiries for such general information was applied equally to all the vendors.

69. In its Proposed Recommended Order HMS argues the following issue: "AHCA could not assess the 'value' of ACS's proposal where AHCA and ACS failed to reach an agreement on critical contract terms that are essential to a best value determination." Specifically, HMS was referring to ACS's use of

the Smart TPL and MEVSNET technology. This issue was not raised in the Second Amended Formal Written Protest Petition of Health Management Systems, Inc. Subsection 120.57(3)(b), Florida Statutes, requires "[t]he formal written protest shall state with particularity the facts and law upon which the protest is based." HMS amended its formal written protest two times and did not include the issue in either amendment; therefore, the issue can not be raised after the final hearing.

70. HMS has failed to establish that the proposed contract award to ACS was contrary to ACHA's governing statutes, AHCA's rules or policies, or the specifications of the ITN. HMS failed to prove that the intended award is clearly erroneous, contrary to competition, arbitrary or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered dismissing HMS's formal written protest and awarding the contract to ACS.

DONE AND ENTERED this 15th day of August, 2008, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2008.

ENDNOTES

^{1/} Unless otherwise indicated, all references to Florida Statutes are to the 2007 codification.

^{2/} At the time that ACS submitted its e-mail on February 13, 2008, the first addendum had not been issued, and ACS would have no way to know that the oral response given by AHCA at the vendors' conference would not be published as an addendum.

^{3/} As reflected in the 10-Ks of the parent companies, Affiliated Computer Services had gross revenues of 5.7 billion dollars, and HMS Holdings Corp. had gross revenues of 87 million dollars.

^{4/} HMS stated at the final hearing that this allegation was no longer an issue.

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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.