

STATE OF FLORIDA

DEPARTMENT OF JUVENILE JUSTICE

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

THE HENRY AND RILLA WHITE YOUTH)
FOUNDATION, INC.)
)
Petitioner,)
)
v.)
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent,)
)
and)
)
ECKERD YOUTH ALTERNATIVES, INC.,)
)
Intervenor.)
_____)

DJJ Case No.: 08-0024
DOAH No.: 08-3969BID

FINAL ORDER

This matter is now before the undersigned for issuance of final agency action in regard to the Petitioner's challenge to the Respondent's (hereafter "Department's") decision to reject all bids in its request for proposals #P2043 (hereafter "the RFP"). At issue was whether the Department's decision to reject all bids on the RFP was illegal, arbitrary, dishonest, or fraudulent. The protest was conducted pursuant to section 120.57(1), Florida Statutes, with a formal hearing conducted on

September 15, 2008, before Administrative Law Judge Harry L. Hooper, in Tallahassee, Florida.

A "Recommended Order" was entered on October 27, 2008, which is attached and incorporated within this Final Order. Pursuant to section 120.57(3)(e), Florida Statutes, the parties were allowed 10 days within which to submit written exceptions. Petitioner, The Henry and Rilla White Foundation, Inc. (hereafter "White Foundation") timely filed seven exceptions. Intervenor, Eckerd Youth Alternatives, Inc., (hereafter "EYA") timely filed two exceptions. The Department did not file exceptions.

Findings of Fact

The Department adopts the "Findings of Fact" set out in paragraphs 1 through 46 of the Recommended Order.

Conclusions of Law

The Department generally accepts the "Conclusions of Law" set out in paragraphs 47 through 62 of the Recommended Order. There, the ALJ concluded, based upon the facts presented, that the Department's decision to reject all bids was not arbitrary, having already concluded that there was no evidence indicating the decision was illegal, dishonest, or fraudulent.

Exceptions

1. In its first exception, directed at paragraph 38, White Foundation disputes the finding that on the critical subject of accreditation the RFP "provided guidance that could confuse an

evaluator and could result in a decision . . . contrary to DJJ policy that DJJ attempted to express in the RFP." (RO.15).

According to White Foundation, there was no confusion on the part of bidders or DJJ personnel as to how accreditation should be scored and, in fact, the only error that was made in this regard was not the product of confusion, but was "patently unreasonable, defied logic and did not comport with a plain reading of the RFP and was therefore arbitrary." (White Foundation Exceptions, pp. 1-2).

In essence, White Foundation asserts that Paul Hatcher, the reviewer assigned to score the accreditation submissions, acted unreasonably and contrary to the plain meaning of a pellucidly clear RFP. Because neither Hatcher nor any of the bidders was confused regarding the scoring of accreditation, the rejection of all bids was arbitrary, and not justifiable as a means of providing a clear and consistent procurement process.

The exception is denied. Hatcher testified that he gave White Foundation none of the possible 30 points for accreditation, based upon his reading of the following provisions in the RFP:

The Department . . . is not responsible for research to provide information not submitted and documented by the prospective Provider. Failure to provide the required supporting information for Parts II or III of the attachment shall result in a score of zero (0) for that section.

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Part III

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[Prospective providers seeking points for accredited entities]

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8. Must provide documentation that establishes the accredited entity is offered as part of the prospective Provider's proposal (i.e. RFP) Proposal page and/or section reference);

(Jnt.Exh.2, p. 16, 22). According to Hatcher, White Foundation's failure to include specific page and section cross-references in its accreditation documentation necessitated a score of zero points. (T.127, 129, 134). The Department's Chief of Contracts, Amy Johnson, testified that the scoring directive was not clear to Hatcher, and that under his "very strict interpretation" of this "poorly-worded" provision, one could see how points would be denied, contrary to the Department's intent. (T.163-64). According to Johnson, the RFP was clarified to delete item eight "because it was confusing and unnecessary." (T.168).

2. White Foundation's second exception, directed at paragraph 45, is closely related to its first exception. The Recommended Order concludes that the Department rejected all bids and initiated a new RFP to carry out its intent to have consistency in scoring among residential and non-residential procurements.

Although White Foundation does not dispute the Department's asserted intent to provide for consistent scoring, it again

posits that Hatcher's scoring was singularly unreasonable, making it "arbitrary to reject all bids due to an internal scoring error on the part of a single employee." (White Foundation Exceptions, p. 2).

The exception is denied. Hatcher had seven years of experience scoring the past performance sections of nonresidential RFPs, such as the one at issue. (T.144). His counterpart scoring residential RFPs, Laura Moneyham, reached a different result, which would have favored White Foundation. (Pet.Exh.19, pp. 2-3; T.166). The inconsistency between nonresidential and residential scoring was the basis for the Department's decision to clarify its scoring requirements and to reject all bids. (Pet.Exh.18, pp. 7, 10; T.158-60, 162). Although Hatcher's scoring worked to White Foundation's detriment, and was contrary to the "common practice" elsewhere in the Department (T.161), it was not so unreasonable as to render clarification of the RFP unnecessary and the Department's rejection of all bids arbitrary. (T.163-64).

3. White Foundation's third exception is directed at the following finding of fact:

43. Upon reviewing the situation, Deputy Secretary Rod Love and Assistant Secretary Darryl Olson determined that all bids should be rejected and the process begun anew. It cannot be determined from the evidence whether that decision was made before the White Foundation protested, or after.

(RO.16). According to White Foundation, the statement suggests that the Deputy Secretary and Assistant Secretary were aware that correction of the scoring errors would have resulted in an award to White Foundation.

The exception is denied. The finding is supported by competent substantial evidence (Pet.Exh.18, p. 7). To the extent there is a further "suggestion" unsupported by the record, it cannot be gleaned from the Recommended Order so as to require correction.

4. White Foundation's fourth exception is directed at the following portion of paragraph 46: "For reasons that will be addressed below, the decision to reject all bids also was not arbitrary." (RO.17).

The exception is denied. White Foundation's assertion that "the evidence shows that the decision to reject all bids was arbitrary" (White Foundation Exceptions, p. 2), is repetitive of other exceptions, is conclusory on the ultimate issue, and is denied for the reasons explained herein.

5. In its fifth exception, directed at paragraph 54, White Foundation asserts that the quoted material from Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So.2d 1128, 1131 (Fla. 1st DCA 1991), is "inapplicable to the case at hand." Specifically, White Foundation argues that Scientific Games involved a subjective evaluation of proposals, while the instant

protest involves a "clear error in an objective scoring process."
(White Foundation Exceptions, p. 3).

The exception is denied. The Recommended Order did not reference Scientific Games as the governing standard in the instant case; the standard is set out in paragraph 60, and no party has taken exception to that portion of the Order. Rather, Scientific Games is cited to describe in general terms the discretion given to public bodies in competitive procurement cases. It merely introduces a more thorough discussion of the distinction between award cases such as Scientific Games, and the increased discretion afforded to agencies in cases involving the rejection of all bids. Although the reference adds little to the Recommended Order, no grounds have been provided that would support its rejection or modification in accordance with section 120.57(1)(1), Florida Statutes.

6. White Foundation's sixth exception is directed at paragraph 61, where the Recommended Order applies the governing legal standard set out in the preceding paragraph to the instant case:

61. DJJ rejected all bids because certain evaluation instructions were sufficiently vague that more than one interpretation resulted and because DJJ desired consistency in evaluations, especially between RFP evaluations for residential and non-residential programs.

(RO.22). White Foundation argues that this is actually a finding of fact unsupported by the evidence, repeating its assertions

that the RFP was clear, that Hatcher was "blatantly incorrect and illogical," and the rejection of all bids was therefore arbitrary. (White Foundation Exceptions, p. 3).

The exception is denied. The excepted paragraph merely takes the factual findings set out in portions of paragraphs 38, 40, 42 and 45, and applies them to the previously articulated legal standard. To the extent this renders the conclusion a finding of fact, it is one that is clearly supported by competent substantial evidence. (Pet.Exh.18, pp. 9-10; T.163-64, 168). In any case, there is no basis for rejecting or modifying the conclusion.

7. White Foundation's seventh and final exception is directed at paragraph 62, which summarizes the Administrative Law Judge's ruling on the ultimate issue of whether the rejection of all bids was arbitrary:

62. Whether rejecting all bids was the best course of action, or a bad decision, the preponderance of the evidence demonstrated that it was a decision made in an effort to provide a clear, consistent, and fair procurement process. The decision to reject all bids was made after contemplation and rational thought. Therefore, it was not arbitrary.

(RO.22-23). Here, again, White Foundation repeats its assertion that the rejection of all bids was arbitrary: "Facts and logic do not support DJJ's decision to reject all bids, where an employee made a clear scoring error, and where there is a qualified

proposal which should have been awarded the highest score."

(White Foundation Exceptions, p.4).

The exception is denied. Evidence supported the conclusion that the decision to reject all bids was indeed made to provide a clear and consistent procurement process in the best interest of the State. (Pet.Exh.18, pp. 7, 10). Consequently, there is no basis for rejecting or modifying the conclusion.

8. EYA's first exception is directed at a portion of the Preliminary Statement. Specifically, the Recommended Order indicates that following the June 20, 2008, notice of intent to award the contract to EYA, "White Foundation timely protested." (RO.2). According to EYA, this contradicts the parties' Joint Prehearing Stipulation, which notes that following the June 20 intended award, "White Foundation filed a timely *notice of intent to protest* DJJ's intended award to EYA, *but did not file a formal protest* of DJJ's notice of intent to award." (Joint Prehearing Stipulation, p. 7, ¶7).

The exception is denied. Any confusion produced by the shorthand reference to a "timely protest" is clarified later in the paragraph, where it is revealed, consistent with the Prehearing Stipulation, that on "July 9, 2008, [White Foundation] filed a formal bid protest petition." (RO.3). Of course, by this time, the Department had already noticed its decision to reject all bids. In sum, the Recommended Order cannot be read as

suggesting that the Department reviewed the particulars of White Foundation's bid protest prior to deciding to reject all bids.

9. EYA's second and final exception is directed at paragraph 43, which is also the subject of White Foundation's third exception. Here, EYA disputes the finding in the Recommended Order that it could not be determined whether the decision to reject all bids was made before or after "the White Foundation protested." Again, EYA points to the Joint Prehearing Stipulation as conclusive evidence that the June 25 rejection of all bids preceded White Foundation's July 9 formal bid protest.

The exception is denied. The unfortunate and frequent use of "protest" as a shorthand reference, invites confusion between notices of intent to protest and the later, formal written protests. But read in its entirety, the Recommended Order cannot reasonably be interpreted as suggesting that the decision to reject all bids was made after White Foundation filed its formal written bid protest on July 9. Rather, the notice of rejection (June 25) clearly preceded the formal protest, and the Recommended Order correctly noted that it could not be determined whether the "decision," as opposed to its notice thereof, preceded or followed the notice of intent to protest. Although there was testimony that the decision may have preceded the protest, the witness could not be certain, as she was not the individual who made the decision. (Pet.Exh.18, pp. 6-7). In

sum, there is no basis for rejecting this factual finding in the Recommended Order.

Order

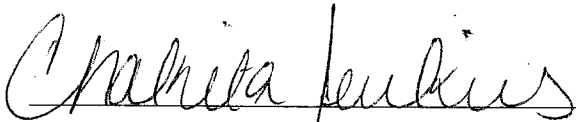
Based upon the foregoing it is hereby **ORDERED**:

1. The Administrative Law Judge's Findings of Fact and Conclusions of Law are adopted as described above.
2. The Petitioner's protest is dismissed.

Entered this 24th day of November, 2008, in Tallahassee, Florida.



FRANK PETERMAN, JR., SECRETARY
Department of Juvenile Justice



Chakita Jenkins, Agency Clerk

Notification of Right to Appeal

In accordance with the provisions of section 120.68(1), Florida Statutes, a party who is adversely affected by this Final Order is entitled to judicial review. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk, Department of Juvenile Justice, 2737 Centerview Drive, Suite 3200, Tallahassee, Florida 32399-3100, and a second copy, accompanied by filing fees prescribed by section 35.22, Florida Statutes, with the District Court of Appeal, First District, 301 Martin Luther King, Jr. Boulevard, Tallahassee, Florida 32399-1850, or with the District Court of

Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

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