

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE HENRY AND RILLA WHITE YOUTH)
FOUNDATION, INC.,)
)
Petitioner,)
)
vs.)
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent,) Case No. 08-3969BID
)
and)
)
ECKERD YOUTH ALTERNATIVES,)
INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on September 15, 2008, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Respondent's decision to reject all bids in DJJ Solicitation Number: RFP# P2043 was illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

Respondent Department of Juvenile Justice (DJJ) issued a request for proposals, DJJ Solicitation Number: RFP# R2043 (RFP), on April 30, 2008. The RFP was entitled, "120-Slot Community-Based Intervention Services Program in Circuit 5." The Henry and Rilla White Youth Foundation, Inc. (White Foundation), Eckerd Youth Alternatives, Inc. (EYA), and others, responded. On or about June 20, 2008, DJJ announced its intent to award the contract for the program to EYA.

White Foundation timely protested. On June 25, 2008, DJJ issued a "Notice to Withdraw the Notice of Agency Decision for RFP #P2043." (The discrepancy in the letter preceding the RFP number appearing on the first page subject line of the RFP document, an "R," is deemed to be a scrivener's error.) On

June 26, 2008, the White Foundation timely filed a notice of intent to protest DJJ's intended decision. On July 9, 2008, it filed a formal bid protest petition. DJJ referred the matter to the Division of Administrative Hearings, and the petition was filed August 15, 2008.

On August 18, 2008, EYA filed an Amended Petition to Intervene, which was granted on August 19, 2008. During a telephone hearing on August 27, 2008, all parties agreed to a hearing date of September 15, 2008. This date conformed to the time constraints provided in Subsection 120.57(3)(e), Florida Statutes (2007).

At the hearing, the White Foundation presented the testimony of Ashley Nevels, and offered 19 exhibits. All White Foundation exhibits, except White Foundation Exhibit 12 for identification, were accepted into evidence. DJJ presented the testimony of Amy Johnson and Paul Hatcher and offered two exhibits that were accepted as evidence. EYA presented no witnesses and offered a single composite exhibit that was accepted into evidence. Two joint exhibits were accepted into evidence.

A transcript was filed on September 29, 2008. After the hearing, all parties timely filed Proposed Recommended Orders. The Proposed Recommended Orders were considered in the preparation of the Recommended Order. On October 10, 2008, DJJ

filed an Amended Proposed Recommended Order. Although this filing was late, the only change was to correct an apparent transposition of names in paragraphs 62-70, and therefore it was considered.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

FINDINGS OF FACT

Parties

1. DJJ is a state agency whose mission is to reduce juvenile delinquency. One of the methods used to attempt to attain this goal is through the provision of community-based intervention services programs for boys and girls.

2. EYA and the White Foundation, both of whom are not-for-profit foundations, are contractors who are in the business of providing community-based intervention services for boys and girls. There are about 320 to 360 contracts between DJJ and private contractors. Both EYA and the White Foundation, at all times pertinent, had contracts with DJJ. The White Foundation operates only non-residential programs. EYA operates both non-residential and residential programs.

Background

3. In RFP#R2043 dated April 30, 2008, DJJ solicited requests for proposals for a contract to provide, "A 120-slot community based intervention program for boys and girls in

Circuit 5 (Marion, Citrus, Hernando, Sumter, and Lake Counties, as described in the Scope of Services (Exhibit 1)." EYA is the current operator of the program and continues to operate the program pursuant to an extension of their current contract. That extension is set to expire December 31, 2008.

4. The program sought can be further described as a nonresidential, service-oriented intervention program with comprehensive case management services for department-served youth through the development of a provider designed, developed, implemented, and operated intervention program for youth. The program is to serve youth on probation, conditional release, or post-commitment probation, and is to include supervision of youth transitioning from a residential commitment program, released from residential commitment program for post-commitment services, or placed on probation.

5. The RFP provided that "The Department reserves the right to accept or reject any and all bids, or separable portions thereof, . . . if the Department determines that doing so will serve the State's best interests."

6. EYA and the White Foundation submitted timely, responsive proposals. Proposals were also submitted by Gulf Coast Treatment Center, Psychotherapeutic Services of Florida, Silver River Mentoring & Instruction, Community Action Foundation of Citrus County, and Taylor Human Services. No

responder availed themselves of the opportunity to ask questions about the RFP.

7. On June 20, 2008, DJJ published its notice of intent to award the contract to EYA.

8. On June 25, 2008, DJJ published a notice of its withdrawal of its previous decision on the RFP and its intended decision to re-issue the solicitation for the program.

9. On June 26, 2008, the White Foundation timely filed a notice of intent to protest DJJ's intended decision.

10. On July 9, 2008, the White Foundation timely filed a formal bid protest challenging DJJ's intended decision.

Evaluation generally

11. The language contained in the RFP is boilerplate language that is repeated with little change in all solicitations for both non-residential and residential programs, with the exception of the scope of services portion.

12. Attachment D of the RFP is entitled, "Evaluation Criteria." It provides that the proposals are to be evaluated and scored in three categories: technical proposal (referred to as "Volume 1"), financial proposal (referred to as "Volume 2"), and past performance (referred to as "Volume 3").

13. Generally, at DJJ, an evaluation panel of three to five evaluators reviews Volume 1, the programmatic elements, or the technical proposal. In this case, three evaluators scored

Volume I. The financial proposal, or Volume 2, was a mathematical formula that essentially required no subjective analysis. A single evaluator simply determined the lowest price that was under the maximum amount the RFP permitted. The evaluation of the third part or Volume 3, past performance, was accomplished by Senior Management Analyst II, Paul Hatcher, acting alone.

14. Mr. Hatcher has been an employee of DJJ for 23 years and has been an evaluator of RFPs for seven years. His role in evaluating the RFP was intended to be objective. In other words, he was tasked with reviewing the information provided and ensuring that it met the requirements of the RFP. His evaluation was not supposed to be subjective or judgmental.

15. Typically, and in this case, subsequent to the evaluation of the parts, the DJJ Contract Administrator enters the various scores into a bid tabulation sheet to determine the high scorer. It is DJJ's intention in all cases to award the contact to the prospective provider whose proposal receives the most points. In this case, on June 19, 2008, the contract administrator determined that EYA received 817.22 points and the White Foundation received 785 points. Other responders scored lower.

16. To the extent the controversy is concerned with which party should have been awarded the most points, the focus is on

the past performance evaluation. The past performance category addresses the prospective provider's knowledge and experience in operating non-residential juvenile justice programs. The criteria related to the past performance category, Volume 3, are contained in Attachment C to the RFP.

17. Attachment C consists of three parts: Part I - Past Performance of Non-Residential Programs; Part II - Evaluation for Past Performance in the United States Outside of Florida; and part III - Evaluation for Professional Accreditation in the United States.

18. Attachment C further states that if the prospective provider has received DJJ Quality Assurance (QA) reviews and recidivism rate results for its non-residential programs, the provider should complete only Parts I and III. Both the White Foundation and EYA had QA reviews and thus were required to address only Parts I and III. This information was available to all parties through access to DJJ databases.

Part I of Attachment C - Past Performance of Non-Residential Programs

19. Part I of Attachment C permitted the assignment of 100 points for "Average QA." For programs receiving a quality assurance review prior to 2007, responders could receive up to 75 points for performance scores and up to 25 points for compliance scores.

20. Part I provided a grid entitled, "Attachment C-1 Part I, Data Sheet: Past Performance of Non-Residential Programs." (past performance data sheet). The past performance data sheet has columns labeled "Contract Number," "Program Type," "Contract Begin Date," "Contract End Date," "Most Recent QA Performance Percentage Score," "Most Recent QA Compliance Percentage Score (if evaluated prior to 2007)," and "Failure to Report." There is also a column entitled "Number of Completions during FY 2005-2006" in which is recorded the number of youths who complete the programs. A final column is labeled, "2005-2006 Recidivism Rate."

21. The "Most Recent QA Performance Percentage Score," "Most Recent QA Compliance Percentage Score (if evaluated prior to 2007)," "Failure to Report," "Number of Completions during FY 2005-2006," and "2005-2006 Recidivism Rate," are found in databases available from DJJ. This form is quite similar to the forms in RFPs for the residential programs.

22. Ashley Nevels, an accountant, and vice-president of administration for the White Foundation, reviewed all of the records pertaining to the responses to the RFP. Mr. Nevels found Volumes 1 and 2 to be essentially correct. He found errors in Volume 3. Though not qualified or considered as an expert witness, his testimony was helpful in illuminating the forms and procedures used in evaluating the responses.

23. Mr. Nevels carefully reviewed responses in Volume 3 submitted by the White Foundation and EYA. With regard to the past performance data sheet, he found that there was information provided by EYA that was erroneous and information that was omitted. He found that Mr. Hatcher had corrected the erroneous information supplied by EYA, but did not consider whether or not it was complete.

24. Mr. Nevels concluded that the White Foundation was correct in its report as presented on the past performance data sheet. Laura Moneyham, an employee of DJJ, working in its purchasing section, also reviewed the past performance data sheet. She found that EYA should have been awarded only 813.04 total points instead of the 817.22 that Mr. Hatcher awarded. In other words, EYA received 4.18 more points than it should have received. Her findings generally comported with Mr. Nevels, except he believed EYA received slightly more underserved points than reported by Ms. Moneyham.

25. Based on the testimony of Mr. Nevels, the figures derived by Ms. Moneyham, and a review of the data contained in the exhibit, it is found as a fact that EYA should have received at least 4.18 fewer points on the Attachment C-1 Part I, Data Sheet, than was awarded by Mr. Hatcher. It is further found that the White Foundation's data was correct.

26. The errors found on the past performance data sheet would have not affected the outcome of the award. After corrections, EYA would still have enough points to prevail. However, there was also an error in scoring the Part III accreditation portion of Attachment C. As Ms. Moneyham found on her re-scoring, and as Mr. Nevels had found, the White Foundation was entitled to 30 more points than it received in that category.

Part III of Attachment C - Evaluation for Accreditation

27. It was DJJ's policy, through the accreditation section that was denominated in Part III, to reward providers with points in the procurement process for achieving accreditation status. This was DJJ's policy because accreditation is a qualified endorsement by an outside, objective party that confirms that an organization conforms to recognized service standards.

28. Ten points were to be awarded for each accredited program submitted in the response to the RFP. Both EYA and the White Foundation submitted information on three accreditations. Both responders were eligible to receive 30 points in this category.

29. Attachment C provides, with regard to Part III - Evaluation for Professional Accreditation in the United States, found at page 16 of 63 of the RFP, as follows:

All documentation provided . . . must include the start and end dates, be current dated and valid at least through the start date of the Contract that results from this RFP. The documentation shall also state that the program cited is a non-residential juvenile program and that it is run by the prospective Provider. The Department will verify all information received but 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.

30. EYA responded to Part III by providing a copy of page 24 of the RFP and providing copies of three certificates from the Council on Accreditation (COA) indicating that EYA was accredited in Circuits 6, 7, and 11; a letter from the copies of Bureau of Quality Assurance Performance Rating Profiles; and an explanation that the three programs are operated in the United States under DJJ contract, are non-residential programs, and are operated under the CBIS program model. The EYA certificates did not indicate start dates. Nevertheless, Mr. Hatcher awarded 30 points to EYA.

31. The White Foundation responded to this section by providing copies of pages 20-23 of the RFP and three certificates from the Commission on Accreditation of Rehabilitation Facilities (CARF) that indicated that the White

Foundation was accredited. Mr. Hatcher awarded no points to the White Foundation in the accreditation category.

32. Mr. Hatcher arrived at the White Foundation's score, or non-score, by referring to Part III of Attachment C of the RFP. In that section there appears a list of four accreditation organizations. Accreditation by one or more of these organizations can result in a responder receiving points for the section. Following the list of acceptable accreditation organizations, the form inquires, "Does the prospective provider currently operate or perform a non-residential juvenile justice organization/program/facility/service ('accredited entity') in the United States which is being offered as a part of its RFP proposal, and is that accredited entity in good standing and without restrictions by: . . . " and lists four accreditation agencies. The evaluator is to check "yes" or "no."

33. Immediately following this language, the form recites 12 standards to be addressed if the responder answers "yes." These standards serve as the base requirements for a responder to have an acceptable "yes."

34. Mr. Hatcher found that the White Foundation had not complied with standard eight of the 12 standards, which states, "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)."

35. Mr. Hatcher believed standard eight required documentation of the specific page and section of the RFP to which the accreditation would apply, and that was not provided by the White Foundation in Part III. He believed the White Foundation was required to provide a reference to a specific portion of Volume 1. Because the accreditations supplied did not provide a reference to a proposal page or section, Mr. Hatcher, using a strict interpretation of the requirement, found it to be noncompliant.

36. Mr. Hatcher could have looked at Volume 1 of the White Foundation's response and found the information that was required. He did not look at Volume 1 because he believed that would be "research" of the type prohibited by the guidance found at page 16 of 63 of the RFP.

37. Subsequent to the announcement of the agency decision revealing that EYA had prevailed, as noted, Mr. Nevels and Ms. Moneyham reviewed the evaluations for past performance. Lisa J. Eaton, a Senior Management Analyst II, who is employed by DJJ, also reviewed the evaluations for past performance. Interpreting the same language Mr. Hatcher used for guidance, they all arrived at the opposite conclusion with regard to accreditation and determined that the White Foundation should have been awarded 30 points.

38. It is found as a fact that standard eight of the 12 standards, when read in conjunction with the guidance provided in the first paragraph of Attachment C, Evaluation of Past Performance for Non-Residential Programs, at page 16 of 63, provided guidance that could confuse an evaluator and could result in a decision with regard to accreditation that was contrary to DJJ policy that DJJ attempted to express in the RFP. Agency deliberations with regard to the decision to reject all bids

39. It was brought to the attention of DJJ in December of 2007, by the Recommended Order in Eckerd Youth Alternatives, Inc. v. Department of Juvenile Justice, Case No. 07-4610BID (DOAH December 14, 2007), that the past performance portion of their RFP was infused with ambiguity. As a result, an attempt was made to clarify the type of information that was desired to satisfy the accreditation portion of the past performance part of the RFP.

40. After the responses to RFP# P2043 were received and scored, the contract section of DJJ determined that Mr. Hatcher's scoring was inconsistent with the scoring that had been done on residential RFPs even though the two were 99 percent congruent. The evaluators of the residential programs would provide information omitted by a response, and correct

information that was incorrect when submitted. Then they would score the response.

41. Unlike the residential scorers, Mr. Hatcher did not count QA programs that were missing, but did correct information that was incorrect when submitted, if the contract numbers were correct. This meant that a potential vendor could choose to include their well-performing programs and not report programs that were performing poorly, and thereby gain an advantage. This did not comport with the desires of DJJ.

42. DJJ staff also determined that Mr. Hatcher failed to score the accreditation portion in accordance with their policy objectives. Amy Johnson, Chief of the Bureau of Contracts, believed that Mr. Hatcher was confused by the language of the RFP and that accounted for his incorrect scoring.

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.

44. As a result of the difficulties experienced in RFP# P2043, DJJ staff have attempted to further clarify that information that is omitted or inaccurate will be corrected and used. They have removed standard eight of the 12 standards that referred to the need to cross-reference.

45. It was DJJ's intent to have consistent interpretations and scoring of proposals throughout the Department, and in particular, between bids for residential and non-residential programs. In order to carry out that intent, DJJ decided to reject the bids and initiate a new RFP for the desired project.

46. There was no evidence that the actions of DJJ were illegal, dishonest, or fraudulent. For reasons that will be addressed below, the decision to reject all bids also was not arbitrary.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

48. The White Foundation has the burden of proof in this proceeding. See § 120.57(3)(f), Fla. Stat., and State Contracting and Engineering Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1998).

49. The underlying findings of fact in this case are determined using the preponderance of the evidence standard. See § 120.57(1)(1), Fla. Stat.

50. The recommendation in this case is to be made pursuant to Subsection 120.57(3)(f), Florida Statutes, which provides:

(3) ADDITIONAL PROCEDURES APPLICABLE
TO PROTESTS TO CONTRACT SOLICITATION OR
AWARD. --Agencies subject to this chapter

shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process.

* * *

(f) 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. 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, 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.

51. The operative sentence in the foregoing paragraph is:

"In any bid-protest proceeding contesting an intended agency action to reject all bids, 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."

52. As noted previously, there was no evidence adduced indicating that DJJ's action was illegal, dishonest, or fraudulent. Consequently, there remains only the question of whether the action was arbitrary.

53. As noted in Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978), an agency ". . . has wide discretion to reject all bids and to call for new bids for public contracts. Subsection 337.11(3), Florida Statutes (1977); Willis v. Hathaway, 95 Fla. 608, 117 So. 89 (Fla. 1928); Berry v. Okaloosa County, 334 So. 2d 349 (Fla. 1st DCA 1976); Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978). In making such a determination, the Department cannot act arbitrarily." In order to prevail, an agency must provide visible proof that it was proceeding rationally within the bounds of its discretion and not arbitrarily.

54. In Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991), the Court described the deference to be accorded an agency in connection with a competitive procurement:

The Hearing Officer need not, in effect, second guess the members of the evaluation committee to determine whether he and/or

other reasonable and well-informed persons might have reached a contrary result. Rather, a "public body has wide discretion" in the bidding process and "its discretion, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree."

(Citations omitted; emphasis in original).

55. In U.S. Foodservice, Inc. v. The School Board of Hillsborough County, Case No. 98-3415BID (DOAH Nov. 17, 1998), Administrative Law Judge Robert Meale analyzed the review criteria applicable to the rejection of all bids subsequent to the 1997 legislative revision of the Administrative Procedures Act:

[T]he . . . provisions of Section 120.57(3)(f) represent a Legislative reshaping of bid law, at least in cases in which an agency proposes to award a bid, as opposed to cases in which an agency proposes to reject all bids. When an agency rejects all bids, Section 120.57(3)(f) enacts the deferential standard of review previously stated in Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988).

179. By negative implication, the third sentence of Section 120.57(3)(f) also legislatively endorses the language in Groves-Watkins limiting the administrative law judge's "review" of the agency decision to reject all bids to something less than the typical de novo administrative hearing. In the typical de novo hearing, the administrative law judge does not merely review the agency decision.

180. . . . Logically, once the Legislature chose to distinguish, as it clearly has, between agency decisions to award a bid and agency decisions to reject all bids, the latter decision should receive greater deference. A decision to reject all bids does not directly favor one bidder, and overturning such a decision is compelling the agency to spend money for goods, services, or property when it no longer wishes to do so. The use in Section 120.57(3)(f) of "standard of proof" in award cases and "standard of review" in rejection cases is also consistent with the lesser deference required in award cases, which entitle the protester to a de novo hearing.

* * *

182. The real question is exactly how much less deference is the Legislature mandating in award cases. The valid answer must lie somewhere between the unchanged level of relatively great deference for agency rejection decisions and the relatively little deference for agency action in the typical, nonbid de novo hearing.

56. This does not mean that the agency must prevail in all cases when a protest is made of a decision to reject all bids. For instance, all bids cannot be rejected simply to avoid litigation. See Couch, 361 So. 2d at 175.

57. The reason for rejecting all bids may not be pretextual. Lauderdale Market Place Investments v. Dep't of Juvenile Justice, Case No. 00-3520BID (DOAH July 27, 2001).

58. The rejection of all bids will not be sustained when an agency claims ambiguity in the bid specifications, when no

ambiguity actually exists. See School Food Service Systems, Inc. v. Broward County School Board, Case No. 01-0612BID (DOAH May 31, 2001).

59. If an agency's invitation to bid is seriously flawed, its decision to reject all bids will be sustained. See Caber Systems, Inc. v. Dep't of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988).

60. A definition of arbitrary, which is widely cited and has applicability generally, is found in a case involving a challenge to the validity of a rule, Agrico Chemical Co. v. Dep't. of Environmental Reg., 365 So. 2d 759 (Fla. 1st DCA 1978). There it was said that "an arbitrary decision is one that is not supported by facts or logic, or is despotic." Therefore, in order to prevail, the White Foundation must demonstrate that the decision of DJJ to reject all bids was not supported by facts or logic, or was despotic.

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.

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.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Juvenile Justice issue a final order dismissing the Petition and Formal Protest filed by Petitioner.

DONE AND ENTERED this 27th day of October, 2008, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 2008.

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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.