

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MHM CORRECTIONAL SERVICES,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 09-2577BID
)
DEPARTMENT OF CORRECTIONS,)
)
Respondent,)
)
and)
)
CORRECTIONAL MEDICAL SERVICES,)
INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 12 and 17, 2009, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher M. Kise, Esquire
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent Department of Corrections (the Department) properly determined that there were no responsive proposals to the Request for Proposals entitled Mental Healthcare Services in Region IV, RFP #08-DC-8048 (the RFP); (b) whether the Department's intended award of a contract to provide mental healthcare services to inmates in Region IV to Intervenor Correctional Medical Services, Inc. (CMS), pursuant to Section 287.057(6), Florida Statutes (2008), is unlawful; and (c) whether Petitioner MHM Correctional Services, Inc. (MHM), has standing to challenge the Department's intended award of a contract to CMS pursuant to Section 287.057(6), Florida Statutes (2008).

PRELIMINARY STATEMENT

By formal written protest dated May 4, 2009, MHM challenged the Department's April 21, 2009, notice of intent to award the contract for mental healthcare services in Region IV to CMS.

The formal written protest alleged that the Department's intended award to CMS was erroneous for the following four specific reasons: (a) the Department failed to comply with Section 287.057(6), Florida Statutes (2008), because it began negotiations with CMS for a contract before it terminated the RFP; (b) the Department's Notice of Agency Decision provided no reason for the decision to negotiate solely with CMS, other than the Department negotiated with the highest ranking proposer; (c) the Department's decision that CMS was the highest proposer was erroneous because MHM was the highest ranking proposer; and (d) the Department's decision to negotiate with CMS was not in the best interest of the State because the resulting contract with CMS will cost the State an additional five million dollars over the life of the contract.

A Notice of Hearing dated May 15, 2009, scheduled the hearing for June 12, 2009.

On May 18, 2009, CMS filed a Petition to Intervene. An Order Granting Petition to Intervene was issued on May 20, 2009.

On June 3, 2009, MHM filed a Motion for Entry of Agreed Confidentiality and Protective Order relative to the discovery of confidential trade secret information. The Agreed Confidentiality and Protective Order was issued on June 4, 2009.

On June 5, 2009, MHM filed a Motion to Compel Responses to MHM's First Set of Interrogatories. When the hearing commenced,

MHM agreed that the motion was moot in part. After hearing oral argument, the undersigned denied the motion as to the remaining interrogatories in dispute.

On June 8, 2009, MHM filed a Motion to Compel Responses to MHM's Request for Production of Documents by the Department of Corrections. The Department filed an Amended Response to MHM's Request for Production of Documents on June 11, 2009. During the hearing, MHM agreed that the motion was moot.

On June 9, 2009, MHM filed a Motion to Continue Hearing and Extend Time for Hearing. After hearing oral arguments in a telephone conference on June 9, 2009, the undersigned issued an Order Denying Continuance of Final Hearing on June 10, 2009.

On June 10, 2009, CMS and the Department filed a Joint Motion in Limine to Limit Evidence Relating to Financial Viability. MHM filed a Response in Opposition to the Motion in Limine on June 10, 2009. After hearing oral argument when the hearing commenced, the undersigned ruled that the motion was granted in part and denied for reasons stated on the record.

On June 10, 2009, MHM filed an Emergency Renewed Motion to Continue Hearing and Extend Time for Hearing. After hearing oral argument when the hearing commenced, the undersigned denied a continuance but agreed it might be necessary to extend the hearing time.

On June 11, 2009, MHM filed a Motion to Re-open Discovery. When the hearing commenced, the undersigned reserved ruling on the motion pending MHM's renewal of its request to re-open discovery on a limited basis.

The final hearing was held on June 12 and 17, 2009. MHM called six witnesses: Susan Ritchey, Chief Financial Officer of MHM; Steve Wheeler, President and Chief Operating Officer for MHM; Forrest Frazier, CPA; Ana Ploch, Purchasing Analyst with the Department's Bureau of Procurement and Supply; Robert Staney, Bureau Chief of the Bureau of Procurement and Supply with the Department; and Richard Law, CPA. Respondent and Intervenor did not call any witnesses.

MHM offered exhibits identified as P1-P21, P24-P27, and P29 that were accepted as evidence. Petitioner's Exhibit No. P27 included a composite exhibit consisting of 12 deposition transcripts. Petitioner's Exhibit No. P28 was a composite of exhibits to the depositions. The following exhibits in P28 were offered and received into evidence: 1-9, 13, 16, 18-25, 28-29, 34, 36-38. Exhibits 16 and 24 in P28 were received under seal as confidential/trade secret material.

Respondent offered one exhibit identified as R1 that was accepted as evidence. Intervenor did not offer any exhibits.

On June 22, 2009, MHM and CMS filed a Motion for Entry of Agreed Confidentiality Order with Respect to the Final Hearing

Transcript. On June 24, the undersigned issued an Agreed Confidentiality Order.

The Transcript was filed on June 30, 2009. The parties filed their Proposed Recommended Orders on July 10, 2009.

On July 15, 2009, the Department and CMS filed a Joint Motion to Strike Portions of Petitioner's Proposed Recommended Order. MHM filed a response in opposition to the motion on July 23, 2008. The motion is hereby granted.

FINDINGS OF FACT

The RFP Process

1. The Department issued the RFP on February 5, 2009. Two addendums were issued to the RFP, the first on February 6, 2009, and the second on March 11, 2009. The Department did not receive any protest of the RFP or addendums from MHM or any other proposer within the statutorily set time limit of 72 hours from the issuance of the RFP.

2. At the time of issuance of the RFP, MHM was the incumbent provider of mental health services to inmates in Region IV. At that time, MHM was providing the services at a rate of \$77.62 per month/per inmate. MHM's contract to provide mental health services in Region IV was the result of a prior vendor being financially unable to perform the contract at its agreed rate.

3. The RFP sought proposals from vendors to provide comprehensive mental healthcare services for inmates located at 14 correctional institutions located in the southern part of the State beginning on July 1, 2009. The Department's contract with MHM for those services was set to expire on June 30, 2009. The Department had previously attempted another procurement for replacement of those services in late 2008.

4. Proposals to the RFP were received and opened in a public meeting on March 23, 2009, from CMS, MHM, the University of Miami's Department of Psychiatry and Behavioral Sciences (the University of Miami), and Wexford Health Sources, Inc. (Wexford).

5. The Department's Bureau of Procurement and Supply (BPS) was responsible for overseeing the RFP. The Procurement Manager for the RFP was Ana Ploch. Ms. Ploch's duties included drafting the proposal with the assistance of the Office of Health Services, managing the procurement process by coordinating release of documents, conducting related meetings (such as proposers' conferences, proposal opening, and price opening), conducting site visits, supervising the evaluation process, and keeping records of the process through completion of a summary report of the procurement.

6. Once the Department received the proposals, it began the eight-phased review and evaluation process as set forth in

Section 6 of the RFP. Phase 1 of the review and evaluation process began with the public opening of the proposals that took place on March 23, 2009. Phase 1 also included the review of the proposals to determine if they met mandatory responsiveness requirements. Determination of meeting mandatory responsiveness requirements was made by BPS staff.

7. Mandatory Responsiveness Criteria or "fatal criteria" is described in Section 5.1 of the RFP as requirements that must be met by a proposer for the proposal to be considered responsive. A failure to meet any one of the three following criteria would result in an immediate finding of non-responsiveness and the rejection of the proposal: (a) the subject proposal must be received by the Department by the date and time specified in the RFP; (b) the proposal must include a signed and notarized Certification Attestation Page for Mandatory Statements; and (c) the price proposal must be received by the Department by the date and time specified in the RFP and must be in a separate envelope or package in the same box or container as the project proposal. There is no dispute that all four proposals met these mandatory responsiveness/fatal criteria.

8. In addition to the fatal criteria, a proposal could be found to be non-responsive for failing to conform to the solicitation requirements in all material respects. The RFP,

Section 1.20, clearly set forth the definition of a "material deviation" and the basis for rejecting a proposal as follows:

1.20 Material Deviations: The Department has established certain requirements with respect to proposals to be submitted by vendors. The use of *shall*, *must* or *will* (except to indicate simple futurity) in this RFP indicates a requirement or condition which may not be waived by the Department except where any deviation therefrom is not material. A deviation is material if, in the Department's sole discretion, the deficient proposal is not in substantial accord with this RFP's requirements, provides an advantage to one proposer over other proposers, or has a potentially significant effect on the quantity or quality of items or services proposed, or on the cost to the Department. Material deviations cannot be waived and shall be the basis for rejection of a proposal. (Emphasis in original.)

9. A Responsive Proposal is defined in the RFP Section 1.29 as "[a] proposal, submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation."

10. A minor irregularity is defined in Section 1.26 of the RFP as:

1.26 Minor Irregularity: A variation from the RFP terms and conditions which does not affect the price proposed or gives the proposer an advantage or benefit not enjoyed by the other proposers or does not adversely impact the interests of the Department.

11. Phase 2 consisted of a review of the business/corporate qualifications and technical proposal/service delivery narratives contained in the proposals. This phase was completed individually by evaluation team members.

12. The evaluation team, which consisted of 5 employees from the Department's Office of Health Services, met with Ms. Ploch on March 24, 2009, for instruction on how to proceed with the evaluation. The team members were given the evaluation materials on that date. Evaluation and scoring of the proposals was done separately by each individual without discussion among the members.

13. At the March 31, 2009, bid tabulation meeting, which occurred after the team members scored the proposals, Ms. Ploch told the team members that MHM and the University of Miami were non-responsive to the RFP. Then the scores for the different categories were recorded as announced by each member of the evaluation team.

14. All four proposals were scored for the three categories listed in RFP Section 5.3 (business/corporate experience), Section 5.5 (project staff) and Section 5.6 (technical proposal and service delivery narrative). There is no allegation that the scores assigned to the proposals were done in error or that they were not in compliance with Department rules or procedures.

15. Phase 3 of the review and evaluation process was completed at the same time as Phase 2 and 4, by Ms. Ploch and the BPS staff. That review of the proposals included a determination as to whether the proposers were in compliance with Section 5.3 "Business/Corporate Qualifications." At that point in the review process, BPS determined that the University of Miami's proposal was non-responsive in that the proposer did not have the necessary business experience. This finding has not been disputed by any party.

16. An independent Certified Public Accountant (CPA) completed Phase 4 of the review and evaluation process. The Department hired the CPA to review the financial requirements of Section 5.4 of the RFP. The CPA, Richard Law, was given all the proposals, including the financial documentation, on March 24, 2009. He conducted his review separately from the Department's reviews in Phases 2 and 3.

17. Mr. Law has been a licensed CPA for over 30 years. His major practice area is conducting audits for state governments, as well as private businesses. With more than 10 years of experience reviewing financial documentation for the Department and assisting on the setting of financial benchmarks for numerous procurements, he is highly qualified to perform the evaluation and assessment of these basic financial criteria.

18. The financial requirements and the financial documentation and information that the proposers had to submit are set out in Section 5.4 of the RFP. That section is entitled "Financial Documentation," and provides as follows in pertinent part:

5.4 Tab 4-Financial Documentation

The Proposer shall provide financial documentation that is sufficient to demonstrate its financial viability to perform the Contract resulting from this RFP. Three of the following five minimum acceptable standards shall be met, one of which must be either item d, or item e, below. The Proposer shall insert the required information under **Tab 4** of the Proposal.

- a. Current ratio: $\geq .9:1$ or (.9)
Computation: $\text{Total current assets} \div \text{total current liabilities}$
- b. Debt to tangible net worth: $\leq 5:1$
Computation: $\text{Total liabilities} \div \text{net worth}$
- c. Dun and Bradstreet credit worthiness (credit score): ≤ 3 (on a scale of 1-5)
- d. Minimum existing sales: $\geq \$50$ million
- e. Total equity: $\geq \$5$ million

NOTE: The Department acknowledges that privately held corporations and other business entities are not required by law to have audited financial statements. In the event the Proposer is a privately held corporation or other business entity whose financial statements ARE audited, such audited statements shall be provided. If the privately held corporation or other

business entity does not have audited financial statements, then unaudited statements or other financial documentation sufficient to provide the same information as is generally contained in an audited statement, and as required below, shall be provided.

The Department also acknowledges that a Proposer may be a wholly-owned subsidiary of another corporation or exist in other business relationships where financial data is consolidated. Financial documentation is requested to assist the Department in determining whether the Proposer has the financial capability of performing the contract to be issued pursuant to this RFP. The Proposer MUST provide financial documentation sufficient to demonstrate such capability including wherever possible, financial information specific to the Proposer itself. All documentation provided will be reviewed by an independent CPA and should, therefore, be of the type and detail regularly relied upon by the certified public accounting industry in making a determination or statement of financial capability.

To determine the above ratios, the most recent available and applicable financial documentation for the Proposer **shall be** provided. This financial documentation **shall include:**

5.4.1 The most recently issued audited financial statement (or if unaudited, reviewed in accordance with standards issued by the American Institute of Certified Public Accountant). All statements shall include the following for the most recently audited (immediate past) year.

- a. auditors' reports for financial statements;
- b. balance sheet;

- c. statement of income;
- d. statement of retained earnings;
- e. statement of cash flows;
- f. notes to financial statements;
- g. any written management letter issued by the auditor to the Proposer's management, its board of directors or the audit committee, or, if no management letter was written, a letter from the auditor, stating that no management letter was issued and that there were no material weaknesses in internal control or other reportable conditions; and
- h. a copy of the Dun & Bradstreet creditworthiness report dated on or after February 5, 2009. (Emphasis in original)

19. The RFP provided as follows in Section 5.4.2:

5.4.2 If the year end of the most recent completed audit (or review) is earlier than nine (9) months prior to the issuance date of this RFP, then the most recent unaudited financial statement (consisting of items b, c, d and e above) shall also be provided by the Proposer in addition to the audited statement required in Section 5.4.1. The unaudited financial data will be averaged with the most recent fiscal year audited (or reviewed) financial statement to arrive at the given ratios.

20. Throughout Section 5.4 of the RFP, the emphasis is on the need for audited financial statements. The use of unaudited financial statements alone does not apply to MHM pursuant to the terms of the RFP, but they did apply to other proposers. Both audited and unaudited financial statements were averaged to

determine ratios for CMS and Wexford, where their audited financial statements were older than 9 months. This was clearly permissible under Section 5.4.2.

21. MHM's proposal included audited financial statements dated September 30, 2008, and also additional information, including unaudited financial statements and a financial narrative in which it admitted that its current ratio as of September 30, 2008, was 0.82 and that it had a negative equity of \$24.8 million dollars.

22. MHM was fully aware that it could have difficulty meeting the financial ratios before the Department issued the RFP. As early as January 2008, MHM was considering a stock repurchase. MHM knew its existing contract would come up for rebid. MHM also knew that the Department sometimes used financial criteria and financial ratios as pass/fail ratios. MHM was concerned that the stock repurchase would trigger one of those ratios, causing them to lose the contract.

23. In January 2008, Susan Ritchey, MHM's Chief Financial Officer, and Steve Wheeler, MHM's President and Chief Operating Officer, contacted Mr. Law. Ms. Ritchey and Mr. Wheeler wanted to discuss their concerns regarding financial ratios that the Department might require in the future. During the hearing, Mr. Wheeler denied that the contact with Mr. Law had anything to

do with the instant RFP. There is no persuasive evidence that Mr. Law gave Ms. Ritchey and Mr. Wheeler inappropriate advice.

24. The independent review by Mr. Law of MHM's financial documentation resulted in the finding that MHM only met two of the minimum acceptable standards required by Section 5.4 of the RFP. Mr. Law set out his conclusions on a Department form entitled "Phase IV, Financial Documentation Review to Be Completed by Independent CPA." That sheet reflected that MHM had failed the current ratio with a score of .819, when a ratio of $\geq 9:1$ or (.9) was required (item a). Likewise, MHM failed the "Debt to tangible net worth" and the "total equity" criteria (items b and e, respectively), since MHM had a negative equity of \$22 million dollars.

25. MHM passed the two remaining criteria. First, it met the minimum existing sales (item d) with sales at \$217 million (greater than or equal to \$50 million). Second, it met the requirement of the Dun & Bradstreet creditworthiness score (item c), which needed to be less than or equal to 3, with a score of 1. The Dun & Bradstreet score was not noted on the Department review form because MHM had already failed three of the financial minimum acceptable financial standards.

26. MHM disputes the finding that it failed the "Debt to tangible net worth" requirement (item b) which was a ratio of $\leq 5:1$ or "less than or equal to 5 to 1, a whole number." Net

worth is the same as equity. Following proper accounting practices and a commonsense reading of this mathematical phrase required that both numbers be whole numbers, neither could be a negative. Put simply, a proposer could only have a maximum of five dollars in debt for every one dollar in net worth to pass this minimum acceptable standard. So, for purposes of evaluating this ratio, once it was determined that MHM had a negative equity of \$22 million dollars, there was no way for MHM to pass this critical requirement.

27. The "Debt to tangible net worth" criteria, was meant to be "Debt to net worth." The computation set out below the criteria reflects the proper calculation needed to find debt to net worth, not debt to tangible net worth. Mr. Law performed the computation for debt to net worth as set out in the description of the computation, which was more advantageous to proposers than debt to "tangible net worth," and resulted in a more favorable ratio.

28. The ratio of "-1.77," reflected on MHM's financial documentation review sheet is a mistake because Mr. Law used the number he reached averaging the audited and unaudited financial statements. The correct number is "-2.16," which is based only on MHM's audited financial statement of September 30, 2008. That is, it was a greater negative number, but still negative. Either way, MHM fails this criteria. MHM had no dollars in net

worth as of the issuance date of the RFP. Instead, MHM had a negative net worth of \$24,785,000.00 as of the end of its fiscal year on September 30, 2008, as reflected in its audited financial statement.

29. As to item "a", "Current ratio," a finding of .819 was reached by taking the total current assets (\$23,493) and dividing into that number the total current liabilities (\$28,692), both reflected on the MHM's audited financial statement of September 30, 2008. These numbers taken from MHM's audited financial statements for total current liabilities; total current assets and total equity represent millions, rounded for accounting purposes. MHM reached a similar finding of .82 using its September 30, 2008, audited financial statements.

30. On the date the RFP was issued, February 5, 2009, MHM's audited financial statement of September 30, 2009, was indisputably less than 9 months old and was the only financial statement under Section 5.4.2 of the RFP that could be used to compute the ratios in Section 5.4.2. Even if the unaudited financial statement submitted by MHM were averaged with the most recent audited financial statement, as demonstrated by Mr. Law's attempts to do so, MHM would still not have met the current ratio. Nowhere in the RFP does it allow for the use of

unaudited financial statements alone when there are existing audited financial statements.

31. Mr. Law's completed Phase 4 review of the financial documentation. He returned it to the Department on March 30, 2009.

32. The Department conducted Phase 5 of the review and evaluation process, the Public Opening of the price proposals, on April 2, 2009, in a properly noticed meeting. At that time, the Department knew that there were only two responsive proposals (CMS and Wexford). No public announcement regarding the status of the other proposals had been made at that time.

33. The RFP contained a price cap of \$70.00 per inmate per month as reflected in Section 5.11.2 of the RFP and the Price Information Sheet. The intent of the price cap of \$70 per month was to achieve a price savings for the Department over what it was then paying for mental healthcare services in Region IV, which was nearly \$78.00. The goal of \$70 was considered to be possibly unrealistic, but the true intent was to keep from exceeding the current rate of \$78.00.

34. At the price opening, the following prices were announced: (a) MHM's price was \$70.00 per inmate per month; (b) the University of Miami's price was \$69.49 per inmate per month; (c) CMS's price was \$74.49 per inmate per month; and (d) Wexford's price was \$95.00 per inmate per month.

35. It was later determined that CMS had also submitted an alternative price sheet. However, the alternative price sheet did not affect the responsiveness of CMS's proposal or the Department's subsequent decision.

36. Based on the fact that CMS's and Wexford's proposed prices exceeded the amount set by the RFP, their proposals were deemed non-responsive to the RFP. Consequently, as of April 2, 2009, there were no responsive proposers to the RFP.

37. BPS staff prepared a final score and ranking sheet as required by Section 6.2.7 of the RFP. The scoring and ranking included just the two proposals, CMS and Wexford, that were responsive going into the Phase 5 Price Opening. BPS staff did not perform further scoring and ranking of the two proposals that were non-responsive prior to the Price Opening.

38. Department of Corrections' Procedure 205.002, entitled "Formal Service Contracts," addresses the Department's procedures, terms, and conditions for soliciting competitive offers for certain types of services. The Procedure has separate sections for Invitations to Bid, Requests for Proposals, Invitations to Negotiate and general sections that address all three. There is no requirement in the procedure that addresses the specific situation facing the Department in the mental healthcare procurement.

39. The section of Procedure 205.002 that Petitioner points to, Section (5)(r)3., applies only to instances when the Department is seeking to single source a procurement or negotiate with a single responsive bidder. The section reads as follows in pertinent part:

(r) Receipt of One or Fewer Responsive Bids, Proposals or Responses:

* * *

3. If the department determines that services are available only from a single source or that conditions and circumstances warrant negotiation with the single responsive bidder, proposer, or respondent on the best terms and conditions, the department's intended decision will be posted in accordance with section 120.57(3), F.S., before it may proceed with procurement.

This section of the procedure is clearly inapplicable in the instant case since there were no responsive proposals.

Section 287.057(6), Florida Statutes (2008)

40. Faced with no responsive proposers, the Department considered its options. The Department then decided to negotiate for a contract on best terms and conditions pursuant to Section 287.057(6), Florida Statutes (2008), in lieu of going through a third competitive solicitation.

41. The Department's decision to negotiate was ultimately made by the Assistant Secretary for Health Services in the Department's Office of Health Services. The BPS staff and legal

counsel advised Assistant Secretary Dr. Sandeep Rahangdale about the options available to the Department. Dr. Rahangdale had the following three options: (1) to reject all proposals and begin what would be the third competitive procurement for mental healthcare services in less than 8 months; (2) to negotiate a contract on best terms and conditions under Section 287.057(6), Florida Statutes (2008), since there were less than two responsive proposals to the RFP; or (3) to use the statutory exemption for health services under Section 287.057(5)(f), Florida Statutes (2008), and enter into a contract with any vendor the Department selected. Option 1, to begin a new procurement was time-barred because the Department needed a new contract in place by July 1, 2009.

42. Dr. Rahangdale's primary concern was to insure that the Department provided constitutionally mandated health care, including mental healthcare to all inmates in its custody. In making the decision to negotiate, Dr. Rahangdale reasonably chose to begin negotiations with CMS. He made this decision because, of the two proposers who were responsive except for exceeding the price cap, CMS's price was closest to the \$70.00 per inmate per month goal. Wexford, the other proposer that was responsive except for price, had submitted a price of \$95.00 per inmate per month. Thus, the Department had a reasonable belief

there was a better chance of reaching its \$70 goal through negotiations with CMS.

43. Additionally, CMS was the highest scored technical proposal of the only two responsive proposals prior to the Price Opening. Thus, CMS was a better choice for the Department from a delivery of services standpoint.

44. The Department made a reasoned decision to not abandon all the criteria of the RFP that had to do with qualifications, such as business experience (failed by University of Miami) or financial viability (failed by MHM). Dr. Rahangdale considered and determined that the nature of MHM's and the University of Miami's failure to be responsive could not be changed or cured in the negotiation process unless the Department lowered its expectations regarding performance and corporate viability.

45. Negotiations were conducted between April 7, 2009, and April 9, 2009, by Jimmie Smith of the Office of Health Services. Dr. Rahangdale instructed Mr. Smith to undertake negotiations with CMS on best terms and conditions, and to strive to get as close as possible to a price of \$70.00 per inmate per month in the negotiations.

46. Mr. Smith is a Registered Nurse working in the Department's Office of Health Services. His working job title is Assistant Program Administrator/Contracting. He has the responsibility to contact potential vendors for health-related

services and commodities and to ensure that formal contracts or purchase orders are issued for the required health-related services and commodities. Mr. Smith typically is charged with making initial contact with vendors, handling negotiations for exempt health service contracts, and coordinating the procurement of the services with BPS. He is also a contract manager for healthcare services and advises other contract managers. Mr. Smith was eminently well qualified to negotiate this contract for mental healthcare services on behalf of the Department.

47. Prior to beginning his negotiations, Mr. Smith obtained a complete copy of CMS's proposal, including the price proposal. He contacted CMS'S Senior Director of Business Development, Frank Fletcher, by telephone to conduct the negotiations.

48. Emails dated April 9, 2009, between the Department and CMS's representative reflect an offer by CMS to perform the scope of work described in the RFP at a capitated rate of \$70.00 for the first year of service, with a \$2.50 escalator per year for a five-year non-renewal contract term.

49. CMS also proposed adding a 30-day period for correction of performance measures, prior to the imposition of liquidated damages. The Department counter-offered with a requirement that any failure to correct the performance measure

violation within the 30-day period would result in retroactive imposition of liquidated damages to the day of the violation.

50. These terms and conditions were presented to Dr. Rahangdale who approved them. Dr. Rahangdale considered the \$2.50 escalator, but decided he was satisfied with the initial year price of \$70, a 10% savings for the Department over its current contract and a savings of three million over the life of the contract.

51. On April 10, 2009, Mr. Smith confirmed the tentative agreement to Mr. Fletcher by email. CMS understood that the agreement was tentative until the Department posted a notice of agency decision.

52. The BPS staff prepared an Agency Action Memo, the Summary Report, and the Notice of Intent to Award. The Agency Action Memo contained a recommendation for award and an option of non-award.

53. The Agency Action Memo stated as follows in part:

The Department made the determination that it was in the best interest of the State to proceed with negotiations as authorized by Section 287.057(6), Florida Statutes. The Department negotiated with the highest-ranked Proposer on the best terms and conditions for the resulting Contract.

Based upon the results of the negotiation conducted, it is recommended that the Department awards a Contract to Correctional Medical Services, Inc.

54. A Summary Report was attached to the Agency Action Memo. The report explained the RFP process in detail. It explained the reasons for finding MHM and the University of Miami non-responsive. It explained that CMS and Wexford were non-responsive because they exceeded the price cap.

55.. The report charted the results of the Phase 5--Public Opening of Price Proposals as follows in abbreviated form:

PROPOSER	UNIT PRICE	ANNUAL COST	FINANCIAL	EXPERIENCE
CMS	\$74.59	\$16,536,780	Passed	Passed
Wexford	\$95.00	\$21,090,000	Passed	Passed
U. of M.	\$69.49	\$15,426,780	Passed	Failed
MHM	\$70.00	\$15,540,000	Failed	Passed

56. The report set forth the Department's reasons for negotiating on best terms and conditions pursuant to Section 287.057(6), Florida Statutes (2008), in pertinent part as follows:

Phase 8--Notice of Agency Decision

The procurement of Mental Healthcare Services in Region IV was under competitive solicitation for over eight (8) months, via two (2) different solicitations (ITN and RFP). The companies that submitted proposals in response to this RFP also submitted responses to the previous ITN. Pursuant to Section 287.057(6), Florida Statutes, the Department negotiated with the highest-ranking proposer on the best terms and condition and in the best interest of

the state, in lieu of resoliciting competitive proposals for a third time.

57. The last page of the report charted the Final Score and Ranking for CMS and Wexford. The first chart showed the actual points received by the proposers, the highest points received by any proposal, and the awarded points. The second chart showed the proposed unit price, the lowest verified price, and the awarded points. The third chart showed the total response points, with CMS having 500 and Wexford having 454.64.

58. MHM and the University of Miami were non-responsive as to RFP requirements that the Department, in its sole discretion, determined were non-negotiable. Therefore, the Department properly determined that CMS was the highest-ranking proposer after the Price Opening.

59. As Bureau Chief, Mr. Staney was ultimately responsible for verifying that the four proposals were non-responsive. He and Dr. Rahangdale signed the Agency Action Memo, recommending an award to CMS. On April 15, 2009, Mr. Staney sent the documents to his supervisor, Director of Administration Millie J. Seay.

60. The BPS staff briefed Ms. Seay regarding the Agency Action Memo. Ms. Seay questioned whether the Department should negotiate with Wexford. The BPS staff explained that Dr. Rahangdale had considered negotiating with Wexford but that

he was satisfied with the negotiated rate and the higher technically-scored proposal from CMS.

61. On Monday, April 20, 2009, Ms. Seay signed the Agency Action Memo. The next day the Department posted its intent to award a contract to CMS.

62. The Department's Notice of Agency Decision announced the intent to award a contract for Mental Healthcare Services in Region IV to CMS as follows:

DEPARTMENT OF CORRECTIONS
NOTICE OF AGENCY DECISION
RFP #08-DC-8048
MENTAL HEALTHCARE SERVICES IN REGION IV
Pursuant to the provisions of Chapter
287.057(6), Florida Statutes, the Department
of Corrections announces its intent to award
a contract for MENTAL HEALTHCARE SERVICES IN
REGION IV to the following vendor:

Correctional Medical Services, Inc.

This announcement gave all interested parties notice that the Department was taking some action with regard to the referenced RFP. The Notice also contained the statutorily required language giving all interested parties a point of entry to challenge the Department's intent to award. Accordingly, no proposers were denied an opportunity to inquire into the details of the process that led to an award under the referenced statute, including the evaluation of the proposals and the Department's decision to wait until it had completed Section

287.057(6), Florida Statutes (2008), negotiations to post the intended agency decision.

63 MHM timely filed its Formal Bid Protest Petition with the Department on May 4, 2009.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2008).

65. As the party protesting the Department's proposed action, MHM has the burden of proving the allegations raised in its protest pursuant to Section 120.57(3)(f), Florida Statutes (2008), which provides as follows in relevant part.

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.

MHM has not met its burden of persuasion in this case regardless of whether the standard of proof is "clearly erroneous, contrary to competition, arbitrary, or capricious" or "illegal, arbitrary, dishonest, or fraudulent." See § 120.57(3)(f), Fla. Stat. (2008).

66. The RFP process is governed by Section 287.057, Florida Statutes (2008), which provides as follows in relevant part:

(2)(a) If an agency determines in writing that the use of an invitation to bid is not practicable, commodities or contractual services shall be procured by competitive sealed proposals. A request for proposals shall be made available simultaneously to all vendors, and must include a statement of the commodities or contractual services sought; the time and date for the receipt of proposals and of the public opening; and all contractual terms and conditions applicable to the procurement, including the criteria, which shall include, but need not be limited to, price, to be used in determining acceptability of the proposal. The relative importance of price and other evaluation criteria shall be indicated. If the agency contemplates renewal of the commodities or contractual services contract, that fact must be stated in the request for proposals. The proposal shall include the price for each year for which the contract may be renewed. Evaluation of proposals shall include consideration of the total cost for each year as submitted by the vendor.

MHM's Financial Viability

67. Regarding a challenge to specifications in a solicitation, Section 120.57(3) (b), Florida Statutes (2008), provides as follows in pertinent part:

With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation.

Under Section 120.57(3) (b), Florida Statutes (2008), MHM is barred as a matter of law from now challenging the specifications contained in the RFP and its addenda because it failed to file a protest within the statutory allotted time.

68. MHM's petition alleges that the Department should have found its proposal to be responsive as to the financial viability criteria under Section 5.4 of the RFP. Specifically, MHM contends that the Department mistakenly determined its proposal was non-responsive by (a) not considering its unaudited financial statements alone, and (b) not interpreting one of the stated financial requirements (debt to tangible net worth) in the proper manner.

69. The greater weight of the evidence indicates that the Department appropriately applied the RFP specifications in

reviewing only MHM's most recent audited financial statements. Under the RFP, the Department was not required to review any additional financial documentation in making the determination that MHM was non-responsive to mandatory financial viability requirements. MHM has not met its burden of showing that its proposal met the RFP's financial viability requirements.

Section 287.057(6), Florida Statutes (2008)

70. As to the negotiations entered into after the Department determined that there were no responsive proposals, MHM alleges that the Department violated the provisions of Section 287.057(6), Florida Statutes (2008), as follows: (a) by not terminating the RFP process before negotiating; and (b) by not posting a notice of intent to negotiate pursuant to Section 287.057(6) before negotiating under that statute with CMS. For the reasons set forth below, MHM has failed to carry its burden on these issues.

71. Upon determining that there were no responsive proposals, the Department considered its options of proceeding with a third competitive solicitation, proceeding under the exemption set forth in Section 287.057(6), Florida Statutes (2008), or proceeding under the exemption set forth in Section 287.057(5)(f), Florida Statutes (2008).

72. Section 287.057(5), Florida Statutes (2008), states as follows in relevant part:

(5) When the purchase price of commodities or contractual services exceeds the threshold amount provided in s. 287.017 for CATEGORY TWO, no purchase of commodities or contractual services may be made without receiving competitive sealed bids, competitive sealed proposals, or competitive sealed replies unless:

* * *

(f) The following contractual services and commodities are not subject to the competitive-solicitation requirement of this section:

* * *

6. Health services involving examination, diagnosis, treatment, prevention, medical consultation, or administration.

73. The Department made a reasoned decision to negotiate on the best terms and conditions with CMS pursuant to Section 257.057(6), Florida Statutes (2008), which states as follows:

(6) If less than two responsive bids, proposals, or replies for commodity or contractual services purchases are received, the department or other agency may negotiate on the best terms and conditions. The department or other agency shall document the reasons that such action is in the best interest of the state in lieu of resoliciting competitive sealed bids, proposals, or replies. Each agency shall report all such actions to the department on a quarterly basis, in a manner and form prescribed by the department.

74. When the Department decided to negotiate pursuant to Section 287.057(6), Florida Statutes (2008), it was no longer

governed by the requirements of the RFP. At that point, the Department was free to negotiate with any vendor.

75. The issue of whether an agency is required to follow any particular rules or procedures when it decides to negotiate under Section 287.057(6), Florida Statutes (2008), is not addressed by statute or rule. However it is addressed in Motorola, Inc. v. Department of Management Services, DOAH Case No. 00-2921BID (DOAH, October 3, 2000). In that case, the agency terminated a RFP by posting a notice declaring two proposals non-compliant. See Motorola, at paragraph 6. The next day, the agency advised the two vendors that it had decided to follow a negotiation process pursuant to Section 287.057(4), Florida Statutes.^{1/} See Motorola at paragraph 7. Subsequently, the agency advised the vendors that it reserved the right to negotiate concurrently or sequentially with each of them. See Motorola, at paragraph 9. After a series of meetings with both vendors, the agency decided to negotiate sequentially beginning with one of the vendors. See Motorola, at paragraph 16. The other vendor filed a "Petition to Formally Protest Decision to Negotiate Sequentially and Initially with Com-Net Ericsson Critical Radio Systems, Inc." See Motorola, at paragraph 17.

76. In concluding that the agency's decision to negotiate sequentially was permissible, Administrative Law Judge Don Davis stated as follows:

73. There are no rules, policies, or proposal specification applicable to this procurement. The applicable statute is Section 287.057(4)(m) Florida Statutes. The Department's charge under that statute is to negotiate a contract under the best terms and conditions. There is nothing in the statute limiting or controlling the process by which the Department went about its negotiations and there is no requirement that the Department justify its decision to negotiate sequentially with Com-Net first.

See Motorola, at paragraph 73.

77. MHM's argument that the Department should have negotiated with MHM instead of CMS because MHM received the highest technical scores, had the lowest proposed unit price, and had successfully provided the services for three years is likewise without merit. The Department reasonably decided to negotiate with CMS because it was the highest ranked proposer that, except for cost, had not failed a mandatory, non-negotiable requirement of the RFP.

78. In accordance with Section 287.057(6), Florida Statutes (2008), the Department documented its reasons for choosing to negotiate on best terms and conditions instead of issuing a third solicitation. There was no statutory or other legal requirement for the Department to document its reasons for proceeding under Section 287.057(6), Florida Statutes (2008), before commencing its negotiations with CMS. Additionally, the Department was not required to post a notice that all proposals

had been deemed non-responsive before commencing negotiations with CMS.

79. Nothing in the statutes or rules required the Department to include MHM in the negotiations. Under its contract, MHM was receiving \$77.62 per inmate/per month. CMS's proposal was for \$70 per inmate/per month for the first year. That is a significant change in the reimbursement rate. Considering its past experience with the vendor prior to MHM, the Department was especially concerned that the vendor under the new contract be financially viable. Therefore, the Department properly exercised its discretion not to include MHM in the negotiations.

80. The Department has no policies or procedures applicable to this procurement. As stated above in the Findings of Fact, the Department of Corrections Procedure 205.002, Formal Service Contracts, Section 7(r)(3), does not apply.

81. MHM has not been prejudiced by the Department's decision to post one notice. To the contrary, MHM has been afforded the opportunity to raise all of its issues relating to the RFP and the procurement process in this proceeding. Even if it would have been better practice for the Department to post separate notices that all proposals were determined to be non-responsive, the Department's failure to do so could only constitute harmless error. There is no reason to believe that

the Department would have followed a different decision-making process or reached a different decision.

Standing

82. The course chosen by the Department was "in lieu of a competitive procurement" when it decided to negotiate under Section 287.057(6), Florida Statutes (2008). The Department could have chosen to proceed under the exemption in Section 287.057(5)(f), Florida Statutes (2008). Under either statute, none of the proposers had standing to challenge the method used for negotiations because they are exempt from any competitive process. See University of South Florida College of Nursing v. State of Florida Dept. of Health, 812 So. 2d 572 (Fla. 2nd DCA 2002).

83. Petitioner has failed to establish as a matter of law that its proposal was responsive or that the Department's decision to negotiate with CMS pursuant to Section 287.057(6) was contrary to the Department's governing statutes, rules, policies, or the solicitation specifications in a manner that was "clearly erroneous, contrary to competition, or an abuse of discretion" or "illegal, arbitrary, dishonest, or fraudulent." See Section 120.57(3)(f), Florida Statutes (2008).

RECOMMENDATION

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

Recommended:

That the Department enter a final order awarding the contract for Mental Healthcare Services in Region IV to CMS and dismissing the protest of MHM.

DONE AND ENTERED this 27th day of July, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 27th day of July, 2009.

ENDNOTE

^{1/} This section has been renumbered as Section 287.057(6), Florida Statutes (2008).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 10 days from the date of the Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.