

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TMS JOINT VENTURE,)
)
 Petitioner,)
)
 vs.) Case Nos. 10-0030BID
) 10-0051BID
 COMMISSION FOR THE)
 TRANSPORTATION DISADVANTAGED,)
)
 Respondent,)
)
 and)
)
 MV CONTRACT TRANSPORTATION,)
 INC.,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in these cases on, February 4 and 5, 2010, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: E. A. Seth Mills, Jr., Esquire
Kevin M. Mekler, Esquire
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For Respondent: Thomas Barnhart, Esquire
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For Intervenor: Christopher T. McRae, Esquire
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STATEMENT OF THE ISSUES

The issues in these cases are whether Respondent's proposed contract award pursuant to a Request for Proposals for Medicaid Non-Emergency Medical Transportation in Palm Beach County, Florida, and whether Respondent's proposed contract award pursuant to a Request for Proposals for Medicaid Non-Emergency Medical Transportation Services in Duval County, Florida, are contrary to Respondent's governing statutes, Respondent's rules or policies, or the request for proposals.

PRELIMINARY STATEMENT

Respondent, Commission for the Transportation Disadvantaged (Commission), issued a Request for Proposals for Medicaid Non-Emergency Transportation Services for ten counties in Florida. The request for proposals was numbered RFP-DOT-09/10-9005-JP and shall be referred hereinafter as "the RFP." The Commission, through its procurement agent, Department of Transportation (Department), posted notices of intent to award contracts for Palm Beach and Duval Counties to Intervenor, MV Contract Transportation, Inc. Petitioner, TMS Joint Venture, protested the intended awards for Palm Beach and Duval Counties.

The Petition for Formal Administrative Hearing relating to the Palm Beach County contract was received by DOAH on January 5, 2010, and was assigned DOAH Case No. 10-0030BID. The Petition for Formal Administrative Hearing relating to the Duval County contract was received by DOAH on January 5, 2010, and was assigned DOAH Case No. 10-0051BID. On January 8, 2010, MV Contract Transportation, Inc., filed a Petition to Intervene in each case. An Order granting the petitions to intervene was issued on January 12, 2010.

The parties submitted a Joint Pre-hearing Stipulation in which they stipulated to certain facts contained in Section 5, pages 7 and 8 of the Joint Pre-hearing Stipulation. Those facts have been incorporated in this Recommended Order to the extent relevant.

At the final hearing, official recognition was taken of the case files of the DOAH in DOAH Case No. 10-0030BID and DOAH Case No. 10-0051BID.

At the final hearing, the parties submitted Joint Exhibits 1 through 91, which were admitted in evidence. Petitioner called the following witnesses: Joyce Plummer, Angela Morlok, Elizabeth De Jesus, Douglas Harper, Bobby Jernigan, and Karen Somerset. Petitioner's Exhibits 3 through 13 were admitted in evidence. Respondent called Joyce Plummer as its witness. Respondent did not submit any exhibits

for admission in evidence. Intervenor called David McDonald as a witness. Intervenor's Exhibits 1, 2, 12, 13, and 16 were admitted in evidence.

Petitioner served Intervenor with a request to produce at the final hearing, requesting the production of Intervenor's tax returns. Intervenor objected to the request and was required to file the tax returns with the undersigned for an in camera review. Based on an in camera review of the tax returns, the objection is sustained.

The four-volume Transcript was filed on February 23, 2010. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Commission is an independent commission of the State of Florida created pursuant to Section 427.012, Florida Statutes (2009),¹ and is housed administratively within the Department.

2. The Commission sought proposals to provide Medicaid non-emergency medical transportation, and the Department administered the procurement process for the Commission by issuing the RFP and otherwise administratively handling the procurement for the Commission. Contracts were to be awarded

for ten counties, including Palm Beach and Duval Counties. The proposers were required to submit a separate proposal for each county for which they were seeking a contract.

3. The RFP incorporated three separate addenda, numbered one through three. Addendum No. 2 included a list of potential proposers' questions concerning the RFP and the Commission's responses to those questions. Each proposer was required to include with its proposal a signed acknowledgement certifying its receipt of each addendum.

4. When the notice of solicitation was posted and the addenda were issued, no party filed a protest of the specifications within 72 hours of the posting or issuance of the addenda.

5. MV Contract Transportation, Inc., and TMS Joint Venture submitted their responses to the RFP for both Duval and Palm Beach Counties.

6. MV Contract Transportation, Inc., is a Delaware Corporation, which was incorporated on September 23, 2003. It is a wholly-owned subsidiary of MV Transportation, Inc., which is a California corporation incorporated on December 18, 1978. MV Contract Transportation, Inc., is a separate corporation from MV Transportation, Inc. MV Contract Transportation, Inc., and MV Transportation, Inc., have separate federal employer identification numbers, bank accounts, officers, and directors.

7. TMS Joint Venture was formed by TMS Management Group, Inc., and Transportation Management Services of Brevard, Inc., pursuant to a Joint Venture Agreement dated October 15, 2009. TMS Joint Venture refers to the term "TMS" throughout its proposals as TMS Joint Venture and its respective venturers. TMS Management Group, Inc., was formed on January 4, 2005. Transportation Management Services of Brevard, Inc., was formed on November 23, 2004.

8. Relevant portions of the Joint Venture Agreement provide:

TMSG [TMS Management Group, Inc.] and TMSB [Transportation Management Services of Brevard, Inc.] do hereby acknowledge, pledge, and covenant with one another to allow the full use of their personnel, equipment, assets, and facilities to support and perform any contract(s) to which the Joint Venture may become a party and to do such other things and provide other support to TMS [TMS Joint Venture], as may be reasonably necessary, to allow TMS to submit bids, proposals, or otherwise respond to solicitations for its services on the projects and to perform all contracts which may be awarded to TMS.

* * *

TMSG shall provide financial and administrative support to TMS. In doing so, it is hereby authorized to submit bids and proposals on behalf of TMS. It is further authorized to execute contracts on TMS' behalf and to thereby bind both TMSG and TMSB as Venturers. TMSG shall also be authorized to accept and cash checks made payable to TMS and to deposit such into its

accounts for subsequent use and distribution in accordance with the joint instructions of the Venturers. TMSG shall otherwise be authorized to take all actions, including but not limited to the submission of all payment requests, payment of related bills and expenses, negotiate and execute any needed subcontracts, provider agreements, obtain insurance or bonds if needed and to otherwise execute all documents and conduct all of the business of TMS for the benefit of the Venture.

9. TMS Joint Venture has been awarded contracts pursuant to the RFP for other counties. Those contracts have been entered into by the Commission and TMS Joint Venture/TMS Management Group, Inc., and Transportation Management Services of Brevard, Inc.

10. The Department posted its initial Notice of Intent to Award the contracts pursuant to the RFP at 5:00 p.m. on November 16, 2009. For the Duval County contract, the posting showed that "MV Contract Transportation" had earned a total score of 88.33 and that TMS Joint Venture had earned a total score of 83.99. The initial Notice of Intent to Award proposed to award the Duval County contract to MV Contract Transportation, Inc.

11. On November 19, 2009, TMS Joint Venture filed a notice of intent to protest the contract award for Duval County pursuant to the RFP. The notice of intent to protest identified

the RFP by number, RFP-DOT 09/10-9005-JP-Duval County, Fl. The notice of protest stated:

Please be advised that this firm represents the interests of TMS Joint Venture ("TMS") regarding the above referenced matter. Please accept this as written notice of TMS's intent to protest the above referenced intended award to MV Transportation, Inc. ("MV"). This Notice of Intent to Protest is being forwarded to you pursuant to paragraph 29.1 of the RFP and Florida Statute 120.57.

12. No evidence was presented that any of the parties were confused about who was the intended awardee for the Duval County contract. No evidence was presented that, at the time of the filing of the notice of intent to protest, any of the parties were uncertain that TMS Joint Venture was protesting the intended award of the Duval County contract to MV Contract Transportation, Inc. In its Petition to Intervene for the Duval County contract, MV Contract Transportation, Inc., stated:

On November 16, 2009, the Department posted a Notice of Intent to Award the Duval Contract to MV Contract. On November 19, 2009, TMS filed its Notice of Intent to Protest the award to MV Contract. On November 30, TMS filed a Formal Written Protest and Petition for Formal Administrative Hearing ("the Petition").

13. The initial posting for Palm Beach County showed that TMS Joint Venture had a total score of 91.66 and that "MV Contract Transportation" had a total score of 91.65. The

initial Notice of Intent to Award proposed to award the Palm Beach County contract to TMS Joint Venture.

14. On November 18, 2009, MV Contract Transportation, Inc., filed a notice of intent to protest the award of the Palm Beach County contract to TMS Joint Venture. On December 16, 2009, the Department posted a revised Notice of Intent to Award the Palm Beach County contract to "MV Contract Transportation." The total score of TMS Joint Venture was revised to 89.65, based on a scrivener's error by an evaluator. One of the evaluators had made a mistake in recording the scores from his handwritten score sheet to the typed score sheet. There was no evidence presented that any of the evaluators were given an opportunity to revisit or change their original scoring of the proposals.

15. On December 18, 2009, TMS Joint Venture filed a notice of intent to protest the intended award of the Palm Beach County contract to MV Contract Transportation, Inc. TMS Joint Venture filed a Petition for Formal Hearing concerning the Palm Beach County contract with the Commission on December 28, 2009, as stated in the Certificate of Service.

16. Section 1 of the Introduction portion of the RFP provides:

The Department intends to award contracts to responsive and responsible Proposer or Proposers whose proposal is determined to be the most advantageous to the Department. . . . After the award, said

Proposer will be referred to as the "Vendors." For the purpose of each document, the term "Proposer" means the prime Vendor acting on its own behalf and those individuals, partnerships, firms, or corporations comprising the Proposer team.

17. The term "prime vendor" is not defined in the RFP.

There are references in other sections of the RFP which require the identification of the "prime contractor" in the completion of the Bidder Opportunity List and the Anticipated DBE Participation Statement. The terms prime contractor and prime vendor are synonymous. The Department interprets the term "prime vendor" to mean the entity that will be entering into the contract with the Commission and that will be bound legally to the terms of the contract.

18. The cover letter of each proposal and the forms submitted which required a signature are signed by W.C. Pihl, vice president. Mr. Pihl is a vice president of business development for MV Contract Transportation, Inc.

19. The cover pages of the proposals at issue submitted by MV Contract Transportation, Inc., state that the proposal is submitted by MV Contract Transportation, Inc., and underneath that name further state in italics "A Wholly Owned Subsidiary of MV Transportation, Inc." The cover letter in each proposal states: "Enclosed please find MV Contract Transportation's proposal in response to the State of Florida Department of

Transportation's Request for Proposal for Medicaid Non-Emergency Transportation Services" for the county in which the proposal is being submitted, and "I encourage you to select MV Contract Transportation as your partner for the provision of Medicaid Non-Emergency Transportation Services" for the county in which the proposal is being submitted. The Bid Opportunity List, which was required to be submitted with each proposal, identified the prime contractor as MV Contract Transportation, Inc. If awarded the contracts for Duval and Palm Beach Counties, MV Contract Transportation, Inc., is the entity who would be entering into the contracts and who would be legally bound to the contracts. It is clear that MV Contract Transportation, Inc., is the prime vendor for the proposals at issue.

20. The proposals submitted by TMS Joint Venture stated: "The TMS Joint Venture with its respective Venturers are hereinafter collectively referenced throughout this proposal as 'TMS,' which is the entity submitting this proposal." The proposals identified TMS Joint Venture as the prime vendor.

21. On October 12, 2009, the Department issued Addendum No. 2 to the RFP, which included questions that were received from prospective proposers and the Commission's responses. Question 7 stated: "Page 18, Section 28, Proposal Evaluation: Is the evaluation of the proposal strictly limited to the prime

vendor and the Proposer Team as identified in Section 1, invitation?" The Commission's written response was: "The evaluation of the proposal is based on the prime vendor and their demonstration of their ability to fulfill the requirements of the scope of services."

22. TMS Joint Venture takes the position that question 7 in Addendum No. 2 means that the evaluation of a proposer's experience and capability to fulfill the requirement of the scope of services is limited to a review of the experience and capability of the prime vendor and that the experience of others who are part of the proposer team may not be considered by the evaluators. MV Contract Transportation, Inc., takes the position that the experience of others who are a part of the proposer team may be considered in determining whether the prime vendor has the ability to fulfill the requirements of the scope of services.

23. It is not clear from the testimony what the position of the Commission is concerning whether question 7 in Addendum No. 2 limited the evaluation to the prime vendors' experience. Joyce Plummer, the Department employee responsible for the procurement, relied on the Commission for the answers to the questions asked by the proposers. Bobby Jernigan, the executive director of the Commission, relied on his staff to answer the questions. Thus, no one clearly stated the Commission's

position as to what the Commission intended by the response to question 7 in Addendum No. 2. The proposed recommended order of the Commission does little to shed light on whether the Commission intended to limit the evaluation to the experience of the prime vendor. For example, in its proposed recommended order, the Commission states that the statements about MV Contract Transportation, Inc.'s, experience which included MV Transportation, Inc.'s, experience were not misrepresentations, "as long as it is proper for the proposer to have included information about its parent company" and certain claims made by MV Contract Transportation, Inc., are true, "unless MV can only make claims as to the particulars of MV Contract Transportation, Inc."

24. Based on question 7 and the response to question 7 in Addendum No. 2 and the definition of proposer in the RFP, the evaluation and scoring of the proposals were to be based on the experience, solvency, assets, and capabilities of the prime vendor and not the prime vendor and the proposer team. If the Commission had wanted the experience and solvency of parent companies and affiliates to be considered in the evaluation, it could have said so in its response to question 7, but it did not do so.

25. Section 8.1 of the Special Conditions of the RFP states:

The Department will determine whether the Proposer is qualified to perform the services being contracted based upon their proposal demonstrating satisfactory experience and capability in the work area. The Proposer shall identify necessary experienced personnel and facilities to support the activities associated with this proposal.

26. Section 20.2 of the Special Conditions of the RFP provides that the proposals shall include an executive summary, a management plan, and a technical plan. The sections were described in the RFP as follows:

1. EXECUTIVE SUMMARY

The Proposer shall provide an Executive Summary to be written in nontechnical language to summarize the Proposer's overall capabilities and approaches for accomplishing the services specified herein. The Proposer is encouraged to limit the summary to no more than ten (10) pages.

2. PROPOSER'S MANAGEMENT PLAN

The Proposer shall provide a management plan which describes administration, management and key personnel.

a. Administration and Management

The Proposer should include a description of the organizational structure and management style established and the methodology to be used to control costs, services, reliability and to maintain schedules; as well as the means of coordination and communication between the Proposer and the Commission.

The Proposer shall provide a management plan which describes administration, management

and key personnel. The plan should address the following:

1. Company's experience in providing specialized transportation services, including but not limited to Medicaid NET. Include location and duration.
2. Company's assets available to operate in the county proposed to be served. List all assets that will be committed to this project.
3. Describe the proposed local service area organizational structure and how it fits into the overall organizational structure of your company.
4. Company's ability to comply with the reporting requirements and the Scope of Services. Cite any failures to provide adequate and timely reporting in the past.
5. Company's solvency and ability to assume the risks of service provision in the proposed county.
6. Does your company have a policies and procedures manual? If so, describe the type of policies and procedures contained in your manual, how often they are updated and how they are maintained. (Please provide a copy.)
7. Describe your company's driver training program. How will you ensure you're [sic] your drivers and the drivers of any subcontracted transportation providers are trained?
8. Does your company have a Quality Management Plan? If so, please provide a copy. If not, describe your methods for ensuring quality of services.
9. Describe your company's process for the procurement of subcontracted operators, if applicable, including your efforts for

recruitment and retention of minority businesses.

10. Please describe how your company's internal office practices lessen the impact on non-renewable resources and global climate change (reduction in water, energy, paper use, minimalization of hazardous materials, compressed or flexible work week schedules, etc.).

11. Discuss what initiatives your company will implement to effectively manage current funding levels and secure additional funds to support the system.

12. Provide 3-5 professional references regarding your organization's ability and experience in providing specialized transportation, including but not limited to Medicaid NET services. The references should state the period of time service was provided.

b. Identification of Key Personnel

The Proposer should provide the names of key personnel on the Proposer's team, as well as a resume for each individual proposed and a description of the functions and responsibilities of each key person relative to the task to be performed. The approximate percent of time to be devoted exclusively for the project and to the assigned tasks should also be indicated.

3. PROPOSER'S TECHNICAL PLAN

The Proposer shall provide a technical plan which explains technical approach and facility capabilities.

Technical Approach

The Proposer should explain the approach, capabilities, and means to be used in accomplishing the tasks in the Scope of Services, and where significant development difficulties may be anticipated and

resolved. Any specific techniques to be used should also be addressed in addition to the following:

1. The Proposer should provide a description and location of the Proposer's facilities as they currently exist and as they will be employed for the purpose of this work.
2. Identify your company's software and demonstrate its ability to comply with CMS, HIPPA and Commission software necessary for reporting data as required in Exhibit A, scope of services.
3. Provide documentation demonstrating the number of specialized transportation trips, including but not limited to, Medicaid NET, provided on a monthly basis and show the complaint ration on said trips. Please state when and where these trips were provided.
4. Describe your company's process for tracking and resolving complaints received. Please include the length of time it takes a complaint to be resolved by your organization.
5. Describe your company's ability to monitor activities of subcontracted operators. Reference evaluation tools used and include copies in proposals if available.
6. Please describe your company's vehicle inspection and maintenance program to ensure safe and reliable functioning of their vehicles. Address how your company will comply with the requirements of Chapter 14-90, FAC.
7. Have your vehicles or your subcontractors vehicles, been involved in any accidents that resulted in a fatality

over the last year? Please attach the accident report(s).

8. Describe the process to acquire vehicles for use in the service area. Provide the estimated amount of time required to acquire vehicles.

9. Please describe any alternative energy resources your company or your subcontractors (or expectations listed in procurement for subcontractors) may utilize, such as solar or wind energy, and use of bio-diesel or other alternative fuels in support of your company's energy needs.

10. Provide a detailed plan describing the process that will be followed to ensure a smooth contract start-up on January 1, 2010.

27. Based on the definition of proposer, which includes the prime vendor and the proposer team, and based on the information which was required to be submitted, it is clear that the Commission contemplated that the prime vendor would not necessarily be providing all the services required by the contract and that some services could be subcontracted.

28. In Addendum No. 2, the Commission responded affirmatively to question 8 which provided:

Page 15, Section 2a, Proposer's Management Plan, #1 through #12 and Page 16, Section 3. Proposer's Technical Plan #1 through #10, the terms "company" and "organization" are used throughout this section. Please verify that these terms are to mean the "Proposer."

29. The RFP and Addenda are not models of clarity; however, when the responses to questions 7 and 8 in Addendum No. 2 are considered together, information could be included

about the prime vendor and the proposer team, but only the information about the prime vendor would be used in the evaluation process. Thus, the proposals would have to identify what information related to the prime vendor and what information related to the proposer team.

30. The parties have stipulated as follows:

MV Contract's proposals, in part, described the experience, contracts, facilities, assets and/or personnel of some of its related entities (parent and affiliated corporations).

31. Throughout its proposals MV Contract Transportation, Inc., refers to the term "MV," which it identifies on page 9 of each of the proposals as "MV Transportation, Inc. and its affiliates." The cover letters for the proposals state that MV is the current Subcontracted Transportation Provider (STP) for the county for which the proposal is being submitted, meaning that MV is the current STP for Palm Beach and Duval Counties. However, MV is not the current STP provider in each of the counties; MV Contract Transportation, Inc., is the current STP provider in the two counties.

32. In its proposals, MV Contract Transportation, Inc., refers to the experience of MV, meaning MV Transportation, Inc., and its affiliates. The proposals do not identify who the affiliates are. One would presume that MV Contract Transportation, Inc., is one of the affiliates, since it is a

wholly-owned subsidiary of MV Transportation, Inc., and is submitting the proposals. The proposals do not delineate between the experience and capabilities of MV Contract Transportation, Inc., and MV Transportation, Inc., and its affiliates.

33. The RFP required that each proposal address the "Company's solvency and ability to assume the risks of service provision in the proposed county." The RFP did not require that certain documents, such as a financial statement, be submitted to satisfy this requirement. How this requirement was to be addressed was to be left to the proposer.

34. MV Contract Transportation, Inc.'s proposals address the solvency issue by the following:

5. Financial Resources and Stability
MV is a privately held firm that has neither been bought by nor merged with another firm. The lack of this debt load associated with such transactions has allowed MV to control interest costs and keep money in the pockets of our customers and employees and out of those of lenders.

MV is in sound financial condition and has proven ability to run services efficiently. We are well positioned to handle the risks of this program, and understand the contractual expectations of the CTD, and the service expectations of our passengers.

The Company's financial position is solid, and has strengthened over the last three years as evidenced by the increase in working capital and working capital ratios. The Company has the financial resources and

wherewithal to meet its financial obligations. For more information regarding the financial viability of MV, please contact Mr. Jeff Heavin, Chief Financial Officer, at (707)863-8980, extension 3009.

35. Based on the definition of MV in MV Contract Transportation, Inc.'s proposals, an evaluator could not tell to what extent the proposal is addressing the solvency of MV Contract Transportation, Inc., and the ability of MV Contract Transportation, Inc., to assume the risks of service provision in the proposed county. This is important because MV Contract Transportation, Inc., is the entity that would be legally bound and responsible to perform under the contract. The Commission would not be contracting with MV Transportation, Inc., or other affiliates of MV Contract Transportation, Inc., and, therefore, cannot hold MV Transportation, Inc., liable for the performance of the contract.

36. Section 28 of the Special Conditions of the RFP provides:

28.1 Evaluation Process:

A Technical Review team will be established to review and evaluate each proposal submitted in response to the Request for Proposals (RFP). The Technical Review team will be comprised of at least three persons with background, experience, and/or professional credentials in relative service areas.

The Procurement Office will distribute to each member of the Technical Review team a

copy of each technical proposal. The Technical Review team members will independently evaluate the proposals on the criteria established in the section below entitled "Criteria for Evaluation" in order to assure that proposals are uniformly rated. The Technical Review team will assign points, utilizing the technical evaluation criteria identified herein and complete a technical summary. Proposing firms must attain a score of seventy (70) points or higher on the Technical Proposal to be considered responsive. During the process of evaluation, the Procurement Office will conduct examinations of proposals for responsiveness to requirements of the RFP. Those determined to be non-responsive will be automatically rejected.

28.2 Criteria for Evaluation

Proposals will be evaluated and graded in accordance with the criteria detailed below.

a. Technical Proposal (100 Points)

Technical evaluation is the process of reviewing the Proposer's Executive Summary, Management Plan, and Technical Plan for understanding of project, qualifications, approach and capabilities, to assure a quality product.

The following point system is established for scoring the technical proposals:

Point Value

- 1. Executive Summary 25
- 2. Management Plan 30
- 3. Technical Plan 45

37. The evaluators selected by the Commission to evaluate the proposals for Duval County were Karen Somerset, Douglas

Harper, and Elizabeth De Jesus. The evaluators selected to evaluate the proposals for Palm Beach County were Karen Somerset, Douglas Harper, and Angela Morlok. The evaluators were advised that they were not to discuss the proposals with the other evaluators and that they were required to do an independent evaluation.

38. Each evaluator was to fill out a technical evaluation summary sheet, which essentially tracked the areas listed in Section 20.2 of the RFP for what was to be included in the proposals for the executive summary, the management plan, and the technical plan. Each evaluator based his or her scoring on the maximum allowable points per category. Some evaluators assigned points for various aspects of the proposals, and others just gave points on the overall quality of the category being evaluated. Regardless of the method that an evaluator used to allocate the maximum points for each category, the evaluator evaluated all the proposals in the same manner. None of the evaluators discussed the proposals with the other evaluators, nor did the evaluators discuss how the proposals were to be scored with one another.

39. The RFP did not require the evaluation team members to meet to develop a method to allocate the maximum amount of points for the categories to be evaluated. Although the RFP states, "[t]he Technical Review team will assign points

utilizing the technical evaluation criteria identified herein," it is reasonable to construe the RFP to mean that each of the evaluators was to assign points independently. This reading is reasonable because the rest of the sentence in which that language appears reads "and complete a technical summary." The technical summary was not to be completed by the evaluation team as a whole. Each evaluator was to complete his or her own technical summary for each of the proposals evaluated.

40. Other than Ms. Somerset, who skimmed the contents of the RFP, none of the evaluators had reviewed the RFP, including the addenda, prior to their evaluations of the proposals. Thus, the evaluators were not aware that they were to evaluate the prime vendor, rather than the proposer as defined by the RFP.

41. The evaluators did not consider whether the experience and capabilities being evaluated were those of MV Contract Transportation, Inc., or MV Transportation, Inc. They thought the proposer was "MV." Some of the evaluators knew that "MV" had the STP transportation contracts in Palm Beach and Duval Counties and assumed that entity who had those contracts was the proposer.

42. Section 1 of the Special Conditions of the RFP provides:

Since July 1, 2003, the Department has been using the State of Florida's web-based electronic procurement system.

MyFloridaMarketPlace. PROPOSERS MUST BE REGISTERED IN THE STATE OF FLORIDA'S MYFLORIDAMARKETPLACE SYSTEM BY THE TIME AND DATE OF THE TECHNICAL PROPOSAL OPENING OR THEY WILL BE CONSIDERED NON-RESPONSIVE (see Special Condition 18). (Emphasis in original)

43. TMS Joint Venture is not registered with the myFloridaMarketPlace system; however, the venturers, TMS Management Group, Inc., and Transportation Management Services of Brevard, Inc., are registered with the myFloridaMarketPlace system. No credible evidence was presented on whether the joint venture could have been registered with the myFloridaMarketPlace system.

44. Question 9 of Addendum No. 2 of the RFP stated: "On several forms, the proposer's FEID number is referenced. If the proposer is a joint venture, shall the FEID numbers of each venturer be listed or shall only the lead administrative venturer's FEID number be listed?" The Commission's written response stated: "Only the lead administrative venturer's FEID number should be listed." An entity's FEID number can be used to register with the myFloridaMarketPlace system. Thus, TMS Joint Venture took this response also to mean that, since both the venturers were registered on the myFloridaMarketPlace system, the listing of the lead administrative venturer as being registered on the myFloridaMarketPlace system was sufficient to make the proposals responsive.

45. When Ms. Plummer received the proposals from TMS Joint Venture, she questioned whether the proposals were responsive and discussed it with her supervisor. The Department took the position that both venturers were listed on the system; thus, the registering of the lead administrative venturer was sufficient to deem the proposals of TMS Joint Venture responsive to the requirement to be registered on the myFloridaMarketPlace system.

46. The parties have stipulated that "TMS's proposals described the experience, contracts, facilities, assets and/or personnel of its Joint Venturers."

47. MV Contract Transportation, Inc., contends that TMS Joint Venture is not responsive to the RFP because it listed Greater Pinellas Transportation Management Services, Inc. (GPTMS), as the provider for a contract that was listed in the experience section of TMS Joint Venture's proposals. The listing was clear that GPTMS had been the contractor for the project listed and not TMS Joint Venture. The evaluators could tell by reading TMS Joint Venture's proposals what experience related to TMS Joint Venture and what experience related to GPTMS. The evaluators could not tell from reading the proposals of MV Contract Transportation, Inc., what experience was related to MV Contract Transportation, Inc., because the experience was

described as the experience of MV, which was defined as MV Transportation, Inc., and its affiliates.

48. The RFP required proposers to provide "a description and location of the Proposer's facilities as they currently exist and as they will be employed for the purpose of this contract." TMS Joint Venture described its call center in Clearwater, which "contains 6,000 square feet, with 3,700 feet of additional space to rapidly expand, of administrative space and provides for all functional areas." TMS Joint Venture leases the building in which the call center is located, but it currently shares space in the call center with GPTMS. TMS Joint Venture did not disclose that it is currently sharing space with GPTMS. However, there was no evidence presented that the call center as it currently exists does not have sufficient capability to meet the needs of the contracts at issue.

49. In TMS Joint Venture's proposals, the Management Plan section states:

The TMS senior management has spent years constructing and honing our client eligibility screening systems. TMS staff began innovating these systems in 1991, when management quantitatively analyzed our existing transportation systems. TMS was alarmed when we quantified the considerable costs that running trips for ineligible clients, imposed on the business.

The Management Plan goes on to say what measures TMS Joint Venture takes to ensure that ineligible clients do not receive

services. Mr. David McDonald, the president of TMS Management Group, Inc., explained that the language was meant to demonstrate that the senior staff members of TMS Joint Venture had been constructing and honing eligibility systems since 1991 and that they had applied their experience in developing the screening measures used by TMS Joint Venture.

50. In TMS Joint Venture's proposals, the Management Plan includes the following statement:

For more than 15 years, the TMS team has managed the administration, coordination, and provision of Medicaid and all other types of human transportation. The TMS operations team has nearly 350 years of Medicaid and other transportation related service delivery experience.

This statement is referring to the experience of the management team members and not specifically to the number of years that TMS Joint Venture or the venturers had been in business. That portion of the proposals goes on to list the various current contracts of the venturers of TMS Joint Venture.

51. Section 19 of the Special Conditions of the RFP provides:

Proposals found to be non-responsive shall not be considered. Proposals may be rejected if found to be irregular or not in conformance with the requirements and instructions herein contained. A proposal may be found to be irregular or non-responsive by reasons that include, but are not limited to, failure to utilize or complete prescribed forms, conditional

proposals, incomplete proposals, indefinite or ambiguous proposals, and improper and/or undated signatures.

52. Section 16 of Pur 1001 form attached to the RFP provides:

Minor Irregularities/Right to Reject. The Buyer reserves the right to accept or reject any and all bids, or separable portions thereof, and to waive any minor irregularity, technicality, or omission if the Buyer determines that doing so will serve the State's best interests. The Buyer may reject any response not submitted in the manner specified by the solicitation documents.

CONCLUSIONS OF LAW

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

54. Subsection 120.57(3)(b), Florida Statutes, provides:

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. . . . The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

55. MV Contract Transportation, Inc., takes the position that the formal protest of the Palm Beach County contract was not timely filed. The evidence demonstrated that the notices of protests and the formal written protests filed by TMS Joint Venture for the both the Duval County and the Palm Beach County contracts were timely filed.

56. Subsection 120.57(3), Florida Statutes, provides the procedural requirements for a notice of protest of a solicitation or intended contract award. Subsection 120.57(3)(b), Florida Statutes, provides that "[a]ny person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision."

57. Florida Administrative Code Rule 28-110.003(1) provides a detailed description of the requirements for a notice of protest stating:

(1) A notice of protest shall be addressed to the office that issued the solicitation or made any other decision that is intended to be protested; shall identify the solicitation by number and title or any other language that will enable the agency to identify it; and shall state that the person intends to protest the decision. . . .

58. MV Contract Transportation, Inc., takes the position that the notice of protest filed by TMS Joint Venture for the

Duval County contract was defective because it listed "MV Transportation, Inc. ('MV')" as the intended awardee of the contract. The notice of protest filed by TMS Joint Venture to the intended award of the Duval County contract met the requirements of Florida Administrative Code Rule 28-110.003(1). The notice of protest identified the solicitation and stated that TMS Joint Venture intended to protest the award of the solicitation. The notice did what it was supposed to do, i.e. put the agency on notice that the intended award of the Duval County contract was being protested. The misnaming of the intended awardee of the contract did not mislead the agency or MV Contract Transportation, Inc., about what was being protested.

60. Subsection 120.57(3)(f), Florida Statutes, provides that in a protest to a proposed contract award pursuant to a request for proposals:

[u]nless 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.

61. The court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." (Citations omitted)

62. A capricious action has been defined as an action, "which is taken without thought or reason or irrationally." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied 376 So. 2d 74 (Fla. 1979). "An arbitrary decision is one that is not supported by facts or logic." Id. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enterprises v. Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co. v. Department of Transportation, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an

administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

63. TMS Joint Venture has the burden to establish the allegations in the Petitions for Formal Administrative Hearing by a preponderance of the evidence. Department of Transportation v. Groves-Watkins, 530 So. 2d 912, 913-914 (Fla. 1988).

64. TMS Joint Venture alleges that MV Contract Transportation, Inc., did not submit responsive proposals for Duval and Palm Beach Counties, and it failed to:

- (1) provide a proposal that clearly and unambiguously identified the proposer as MV Contract and which did not misrepresent its experience, contracts, facilities, assets, and/or personnel;
- (2) submit the required data and information to demonstrate its financial condition and solvency;
- (3) have the proposal executed by a duly authorized corporate officer, rather than an officer for a related non-proposer entity;
- (4) correctly represent it had only existed since 2003, rather misrepresenting that the proposer had 35 years of experience;
- (5) correctly represent than many of its claimed contracts and much of its claimed experience was actually the experience of others or identify the company assets available to operate in Palm Beach County

[and Duval County] and to list those assets that were committed to the Palm Beach County project [and Duval County project];

(6) submit evidence of its experience and past performance strictly related to itself, rather than wrongfully misrepresenting it had obtained experience before it ever existed;

(7) correctly represent that the audit results of the Federal Transit Administration or Authority and others referencing the experience and policies described in the proposal were not its experience, qualifications or contracts, but that of others;

(8) submit a proper "organizational structure" for review, but rather submitted only a line of "direct reports" for those who might work on the project; and

(9) submit factually accurate counts and complaint ratios for MV Contract's then current projects.

65. TMS Joint Venture also alleges that the evaluations of the proposals were not proper because the evaluators scored MV Contract Transportation, Inc.'s, proposals based misrepresentations made by MV Contract Transportation, Inc., concerning MV Contract Transportation, Inc.'s, prior experience and current contracts.

66. Additionally, TMS Joint Venture alleged that with regard to the award for the Palm Beach County contract that the Department improperly rescored MV Contract Transportation,

Inc.'s, proposal after the evaluation team members' "scores were revealed, signed, submitted, calculated, tabulated, and posted."

67. Agencies enjoy a wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable people might disagree. See Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capelletti Brothers, Inc. v. Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1963). An agency has the discretion to waive an irregularity in a bid when the irregularity is not material, that is, when it does not give the bidder a "substantial advantage over the other bidders." Tropabest Foods, Inc. v. Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

68. The purpose of competitive bidding for the award of public contracts is to ensure fairness to prospective vendors and to secure the best value at the lowest price to the public. This objective was explained by the Florida Supreme Court in Wester v. Belote, 138 So. 721, 722 (Fla. 1938) as follows:

The object and purpose of competitive bidding is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove, not only collusion, but temptation for collusion and opportunity for gain at public expense; to close all avenues

to favoritism and fraud in its various forms; to secure the best values at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by providing an opportunity for an exact comparison of bids.

69. The evaluators were not aware of the questions and responses contained in Addendum No. 2 and, therefore, were not aware that the evaluation was to be made based on the prime vendor's experience, solvency, and ability to fulfill the requirements of the scope of service. The evaluators considered the experience, solvency, and capabilities of MV Transportation, Inc., and its affiliates in scoring the proposals submitted by MV Contract Transportation, Inc. The evaluators did not evaluate MV Contract Transportation, Inc.'s, proposals in accordance with the requirements of the RFP and addenda. Their evaluation was clearly erroneous. The evaluation gave MV Contract Transportation, Inc., an advantage over the other bidders because the experience, solvency, and capabilities of entities other than the prime vendor were considered.

70. MV Contract Transportation, Inc., was allowed by the RFP to submit experience, solvency, and capabilities of members of the proposer team as well as the prime vendor. The response to question 8 in Addendum No. 2 clearly states that the terms "company" and "organization" in the information to be submitted in the Proposer's Management Plan and the Proposer's Technical

Plan mean proposer, which by definition includes the prime vendor and the proposal team. Because of the way MV Contract Transportation, Inc., defined "MV" in the proposal and because the references to experience, solvency, and capabilities were presented as those of MV, there was no way that the evaluators could determine which information pertained to MV Contract Transportation, Inc., nor could they now on a reevaluation of MV Contract Transportation, Inc.'s, proposals.

71. TMS Joint Venture's claim that MV Contract Transportation, Inc.'s proposals were not signed by a duly-authorized officer for MV Contract Transportation, Inc., is without merit. The proposals were signed by a vice president of MV Contract Transportation, Inc., and no evidence was presented that he did not have the authority to bind MV Contract Transportation, Inc.

72. The reposting of the intended award of the Palm Beach County contract was simply a correction of a scrivener's error which occurred during the transfer of one evaluator's handwritten score to the typed evaluation summary. The proposals had not been reevaluated. The correction did not give any proposer an advantage over the other proposers.

73. TMS Joint Venture claims that the evaluators did not comply with the RFP because they did not meet and develop methodology for allocating the total points assigned to each

section of the proposals to be evaluated. This issue was not raised in the Petitions for Formal Hearing and was not raised in the Joint Pre-hearing Stipulation. Subsection 120.57(3)(b), Florida Statutes, requires that "[t]he formal written protest shall state with particularity the facts and law upon which the protest is based." A formal protest may be amended as any other petition in an administrative hearing. See Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998). TMS Joint Venture did not at any time seek to amend its formal protest to include the issue of further allocation of points by the evaluation committee. However, both TMS Joint Venture and MV Contract Transportation, Inc., have addressed this issue at hearing and in their proposed recommended orders. For the reasons stated in the Findings of Fact, the RFP did not require all the evaluation team members to meet and establish a further allocation of the maximum points allowed for each category.

74. Subsection 120.57(3)(b), Florida Statutes, provides that a person who is adversely affected by an agency decision or intended decision may file a bid protest. The RFP provides that the contracts will be awarded to the proposers who are responsive and responsible and whose proposals are determined to be the most advantageous to the Commission. The relief requested by TMS Joint Venture is not that all bids be deemed

nonresponsive and the RFP be reissued; therefore, in order to have standing to bring a bid protest, TMS Joint Venture must demonstrate that but for the intended award proposed by the agency that TMS Joint Venture would have been awarded the contract. See Intercontinental Properties, Inc. v. Dept. of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3rd DCA 1992); Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So. 2d 517 (Fla. 1st DCA 1971); and Couch Construction Co. v. Dept. of Transportation, 361 So. 2d 184 (Fla. 1st DCA 1978).

75. MV Contract Transportation, Inc., claims that TMS Joint Venture is nonresponsive because it included the experience of the joint venturers and of GPTMS in its proposals. The parties stipulated that TMS Joint Venture's proposals described the experience, contracts, facilities, assets and/or personnel of its joint venturers. The parties did not stipulate that the experience, contracts, facilities, assets and/or personnel described in the proposals were only those of the joint venturers. The RFP contemplated that information would be submitted concerning the proposer, which included the prime vendor and the proposer team. Thus, there was no error made when TMS Joint Venture included a single reference to a contract performed by GPTMS. The proposals clearly indicated that the contract was being performed by GPTMS so that the evaluators knew that for that contract neither the experience of the Joint

Venture nor the joint venturers was being described. Therefore, an evaluation could be made of the experience of the Joint Venture and the joint venturers. No evidence was presented to show that the inclusion of the GPTMS contract made any difference in the points assigned by the individual evaluators.

76. MV Contract Transportation, Inc., claims that TMS Joint Venture's proposals suffer from the same deficiency as MV Contract Transportation, Inc.'s, proposals because information was included about both joint venturers and the evaluations were made of the experiences, capabilities, solvency, facilities, and assets of the joint venturers rather than the joint venture. The difference between MV Contract Transportation, Inc.'s, proposals and TMS Joint Venture's proposals is that both joint venturers are bound if a contract is awarded to TMS Joint Venture, but MV Transportation, Inc., and its affiliates, other than MV Contract Transportation, Inc., could not be held responsible for the performance of any contracts awarded to MV Contract Transportation, Inc., pursuant to the RFP. The court in Metrolimo, Inc. v. Lamm, 666 So. 2d 552, 553 (Fla. 3rd DCA 1995), stated:

Appellants Metrolimo, Inc. and Red Top Transportation, Inc. formed a joint venture called Comprehensive Paratransit Services. Comprehensive entered into a contract with Dade County to provide special transportation services for disabled riders.

* * *

In this case Red Top and Metrolimo formed a joint venture to provide special transportation services. Comprehensive did not itself have employees, but instead the activities of the joint venture were to be carried out by the joint venture partners, Red Top and Metrolimo. The joint venture was free to hire independent contractors, if it wished, but the carrying out of the contract was the responsibility of the joint venture and the joint venture partners. The joint venture and the joint venture partners could not, by subcontracting, exonerate themselves from liability. The joint venture and joint venture partners are liable for the negligent acts of the driver. (Citations omitted)

In the instant cases, TMS Joint Venture; TMS Management Group, Inc.; and Transportation Management Services of Brevard, Inc., would be liable under contracts awarded pursuant to the RFP. Additionally, the Joint Venture Agreement makes it clear that both venturers would be bound by contracts awarded to TMS Joint Venture. Other contracts awarded to TMS Joint Venture pursuant to this RFP have been entered into by TMS Joint Venture/TMS Management Group, Inc., and Transportation Management Services of Brevard, Inc., which means that both venturers are bound to the terms of the contracts.

77. MV Contract Transportation, Inc., contends that TMS Joint Venture is not responsive to the RFP because TMS Joint Venture is not registered with the myFloridaMarketPlace system. The Commission took the position that TMS Joint Venture met the

requirements of the RFP because TMS Joint Venture's proposals listed the lead administrative venturer as being registered with the myFloridaMarketPlace system. Such an interpretation is not clearly erroneous, arbitrary, capricious, or contrary to competition. Both venturers were listed in the myFloridaMarketPlace system, and both would be bound by the terms of any contract awarded to TMS Joint Venture pursuant to the RFP. TMS Management Group, Inc., is the lead administrative venturer who has the authority to accept payments to TMS Joint Venture. In Addendum No. 2, the Commission responded that the FEID number of the lead administrative venturer could be used in forms requiring the listing of an FEID number. An entity's FEID number can be used to register with the myFloridaMarketPlace system. Thus, it is reasonable to deem the myFloridaMarketPlace registration number of the lead administrative venturer to meet the requirements of the RFP. There is no competitive advantage to such an interpretation.

78. MV Contract Transportation, Inc., contends that TMS Joint Venture is not responsive to the RFP because it misrepresented its experience when it talked about experience relating to the methods for ensuring that ineligible clients do not receive services and experience in providing specialized transportation services. The discussion in TMS Joint Venture's proposals relating to the analyses of client eligibility systems

beginning in 1991 is not artfully worded. It was intended to mean that the members of the senior staff had experience developing such systems since 1991. The proposals go on to provide information on how TMS Joint Venture would deal with the eligibility issue in the performance of a contract. The language dealing with analyses since 1991 is a minor irregularity and does not give TMS Joint Venture an advantage over the other proposers.

79. TMS Joint Venture clearly was discussing the experience of its staff in providing specialized transportation services. TMS Joint Venture listed the current contracts that the venturers had relating to the provision of specialized transportation services.

80. MV Contract Transportation, Inc., contends that TMS Joint Venture is not responsive to the RFP because it did not reveal in its proposal that it shared space with GPTMS in the call center that would be used for the contracts. Such failure to disclose is a minor irregularity. No evidence was presented to show that the space was not sufficient to perform the contracts. No evidence was presented that the evaluators would have changed their scores if the information had been disclosed.

81. TMS Joint Venture is responsive to the RFP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the evaluation of the proposals of MV Contract Transportation, Inc., were contrary to the RFP; that the way in which MV Contract Transportation, Inc., submitted its proposals prevents the evaluators from evaluating the proposals in accordance with the RFP; that the notices of protests and formal protests of TMS Joint Venture were timely filed; and that the proposals of TMS Joint Venture are responsive to the RFP.

DONE AND ENTERED this 25th day of March, 2010, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2010.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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