

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ECKERD YOUTH ALTERNATIVES,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 10-0535BID
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent,)
)
and)
)
THE HENRY AND RILLA WHITE YOUTH)
FOUNDATION, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 11, 2010, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the intended contract award to Intervenor pursuant to Request for Proposals P2056 for a Community Based Intervention Services Program in Brevard County, Florida, is contrary to Respondent's governing statutes, Respondent's policies and rules, and the request for proposals.

PRELIMINARY STATEMENT

On December 11, 2009, Respondent, Department of Juvenile Justice (Department), posted a Notice of Agency Action, which indicated that, pursuant to Request for Proposals P2056 (the RFP), the Department intended to award a contract for a Community Based Intervention Services Program for youth in Brevard County to Intervenor, The Henry and Rilla White Youth Foundation, Inc. (White). Petitioner, Eckerd Youth Alternatives, Inc. (Eckerd), had also submitted a proposal to the RFP and filed a Formal Written Protest and Petition for Administrative Hearings (the Petition) on December 28, 2009, contesting the award to White.

The case was forwarded to the Division of Administrative Hearings on February 5, 2010, for assignment to an

Administrative Law Judge. On February 8, 2010, White filed a Petition to Intervene, which was granted by Order dated February 9, 2010. A pre-hearing conference was held on February 9, 2010, and the parties agreed to a final hearing date of March 11, 2010.

On February 17, 2010, Eckerd filed a Motion for Costs and Charges should it prevail.

The parties filed a Joint Prehearing Stipulation, in which they stipulated to certain facts contained in paragraphs 1 through 13 of section E of the Joint Prehearing Stipulation. Those facts have been incorporated in this Recommended Order to the extent relevant.

At the final hearing, the parties submitted Joint Exhibits 1 and 2, which were admitted in evidence. Eckerd called the following witnesses: Ellyn Evans, Paul Hatcher, and Douglas Zahn, Ph.D. Petitioner's Exhibits 1 through 12 were admitted in evidence. The Department called Paul Hatcher as its witness. The Department and White jointly submitted Exhibits 1 through 32, which were admitted in evidence. White did not call any witnesses.

The one-volume Transcript was filed on March 25, 2010. At the final hearing, the parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. On March 31, 2010, White filed Intervenor's Motion

for Extension of Deadline to File Proposed Recommended Order. The motion was granted by Order dated April 1, 2010, and the time for filing proposed recommended orders was extended to April 9, 2010. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is an agency of the State of Florida and is the procuring agency for the RFP at issue in this proceeding.

2. Eckerd is a not-for-profit corporation duly-organized under the laws of the State of Florida.

3. White is a not-for-profit corporation duly-organized under the laws of the State of Florida.

4. On September 4, 2009, the Department issued the RFP to select a provider to operate a 44-slot Community Based Intervention Services Program for youth ages ten through 21 in Brevard County, Florida. Eckerd did not protest the specifications of the RFP nor the methodology that the Department had historically used in scoring proposals for similar services within 72 hours of the issuance of the RFP.

5. Eckerd and White submitted timely responses to the RFP on or before October 14, 2009.

6. Under the RFP, one of the categories that the Department evaluates is the "Evaluation of the Past Performance

for Non-Residential Programs.” One of the three components of the past performance standard is: Part I–Evaluation for Past Performance in Florida. This includes, as a subcomponent, the provider’s “Combined Success Rate” (CSR), with an assigned value of 200 points.

7. The RFP defines CSR as “Percentage of youth who do not recidivate,” and further provides, “Points are awarded based on the combination of successful youth program completions, and the percentage of youth who do not recidivate.”

8. Each proposer was required to complete and submit with its proposal Attachment C to the RFP entitled “Data Sheet: Past Performance of Non-Residential Programs” (Data Sheet). The Data Sheet was to provide certain information for non-residential programs that the proposer had operated in Fiscal Year (FY) 2006-2007, including program name, contract number, number of completions during FY 2006-2007, and FY 2006-2007 Recidivism Rates. Some of the information, such as the completions and the recidivism rates, was to be based on information found in the Department’s 2008 Florida Comprehensive Accountability Report [CAR].¹ The CAR is prepared by the Department and includes program outcomes, including total releases, number of completions, completion rates, and success rates for all types of probation and community intervention programs that released youth in FY 2006-2007. The information is reported by judicial

circuit. The CAR may report information on different programs in a judicial circuit, and some of the programs may be included in one contract with a provider.

9. For example, White has one contract in the Second Judicial Circuit, contract number P2028, but the CAR reports information for two programs under contract number P2028. In the Fourth Judicial Circuit, White has one contract, contract number D7102, under which services are provided in Duval and Nassau Counties. The CAR treats the counties as being separate programs and provides separate data for the services provided in Duval County and for the services provided in Nassau County.

10. As set forth in the Data Sheet, the number of completions is defined as "[t]he number of youth completing the program during FY 2006/2007 documented in the Department's 2008 Florida Comprehensive Accountability Report." In the CAR, the column titled "N4" provides the number of youth who successfully completed a specific program.

11. The recidivism rate is the percentage of youth who later offended. The Data Sheet provides that the recidivism rate is found in the "2006-2007 Recidivism Column as reported in the Department's 2008 Florida Comprehensive Accountability Report." The CAR does not report recidivism rates; it reports success rates. Instead of providing the percentage of youth who completed the program and reoffended, the CAR reports the

percentage of youth who did not reoffend. Thus, the recidivism rate is calculated by subtracting the success rate from 100. The Department relies on data from the CAR in determining the percentage of recidivism because the success completion percentages that are reported in the CAR have been calculated already. Therefore, it is easy to calculate the recidivism percentages using the CAR success rates.

12. Paul Hatcher, senior management analyst for the Department, is the individual responsible for determining the CSR for providers who have submitted proposals in response to requests for proposals issued by the Department. Mr. Hatcher is the only individual who performs this function for the Department and has been in this position, performing this task, for over nine years.

13. Mr. Hatcher processes the proposals through a standard procedure. The RFP provides that the information submitted in the Data Sheet "will be verified by the Department [and] [a]ny inaccurate or omitted information will be corrected." After receiving the proposals, Mr. Hatcher verifies the accuracy of the information provided, including the number of completions and the recidivism rate reported on the Data Sheets submitted with each proposal, against the information provided in the corresponding CAR. If the information regarding a program is

reported incorrectly, Mr. Hatcher corrects it to conform to the information in the appropriate CAR.

14. The information submitted on the Data Sheet is submitted by contract number. The contract number is how the Department identifies quality assurance reviews, as well as fiscal and other data sources. For example, for contract number P2028, White submitted the completions for both programs in the Second Judicial Circuit. One program had 19 completions and the other program had 29 completions, for a total of 48. White intended to combine the completions for placement under Column 9 of the Data Sheet but erroneously used the combined number of releases. Pursuant to the RFP, Mr. Hatcher corrected the data to reflect the combined completions as reported in the CAR.² The CAR reported a success rate of one program as 63% and the success rate of the other program as 69%, which equated to recidivism rates of 37% and 31%. White recorded the recidivism rates for the contract on the Data Sheet as 37%/31%.

15. The same approach was used for reporting the information on contract number D7102 for the services provided in Duval County and Nassau County in the Fourth Judicial Circuit. The services provided in Duval and Nassau Counties were considered by the Department to be one program; however, the CAR reported the information by county as if they were separate programs. The completions for both counties were

intended to be combined for reporting on the Data Sheet, but White recorded the combined number of releases on the Data Sheet.³ Mr. Hatcher corrected the data to reflect the combined completions as reported in the CAR. The CAR reported the success rates for the Duval County program as 62% and the success rate of the Nassau County program as 100%. These success rates equated to recidivism rates of 38% and 0%.

16. Because the Department is looking for the recidivism rate for each contract, and the CAR reports the success rates used to calculate recidivism rates by program as in the Second Judicial Circuit or by county as in the Fourth Judicial Circuit, Mr. Hatcher averages the combined recidivism rates to come up with one recidivism rate for each contract in the Second and Fourth Judicial Circuits. Thus, the recidivism rates for contract number P2028 for the Second Judicial Circuit were averaged, resulting in one recidivism rate of 21%. The same method was applied to the recidivism rates for the Fourth Judicial Circuit, resulting in one recidivism rate of 19%.

17. After checking the reported numbers and making all necessary changes, including making corrections to the data to match the data reported in the CAR and averaging the recidivism rates for contracts encompassing more than one program or more than one county, Mr. Hatcher inputs the number of completions and the recidivism rate for each contract into a standardized

Microsoft Excel spreadsheet (Spreadsheet), which performs the actual calculations and computes the total CSR for each individual proposal.

18. The Spreadsheet uses fixed formulas to perform the mathematical calculations necessary to determine the CSR for each proposal. The last two columns on the right hand side of the Spreadsheet relate to the CSR, and the numbers shown therein are generated by the fixed formulas.

19. The Spreadsheet performs several calculations. It multiplies the number of completions by the recidivism rate for each contract to obtain the number of youth recidivating. Then, from each contract, the number of youth recidivating was subtracted from the number of total completions to obtain the number of successful youth for each contract. It then adds each of these successful youth figures together and divides the total by the combined total number of completions, resulting in the total CSR.

20. The Department awarded Eckerd a score of 129 points based on a 64.5% Combined Success Rate. The Department awarded White a score of 160 points based on an 80% Combined Success Rate.

21. On December 11, 2009, the Department posted its Notice of Agency Action, which indicated its intent to award the contract to White. The Department awarded White the highest

overall score of 1554.49 points. The Department awarded Eckerd the second highest overall score of 1544.49 points.

22. On December 28, 2009, Eckerd filed the Petition pursuant to Subsection 120.57(3), Florida Statutes (2009),⁴ and Florida Administrative Code Rule 28-110.004.

23. The same Spreadsheet had been used by the Department for several years in calculating the CSR for proposals submitted in response to requests for proposals. Additionally, the Department's practice of averaging scores for single-contract programs with more than one set of data was not a new scoring concept for the procurement at issue.

24. In 2007, Eckerd submitted a response to Request for Proposal P2303 (RFP P2303) issued by the Department and was awarded the contract by achieving the highest score that was calculated in the same manner as the scores for the procurement at issue.⁵ In the Data Sheet submitted by Eckerd for RFP P2303, under program name, it entered in one cell, a single-contract program (contract number P70444) operated by Eckerd in the Tenth and Twelfth Judicial Circuits as "Circuit 10, 12, West/EYDC."

25. In its Data Sheet for RFP P2303, Eckerd took the total number of completions from the 2006 CAR for the Tenth Judicial Circuit and the Twelfth Judicial Circuit for contract number P7044, 19 and 31, respectively, and added them together

for a total of 50 completions, which it entered under the "Number of Completions" column.

26. The 2006 CAR reported recidivism rates for the Tenth and Twelfth Judicial Circuits as 26% and 23%, respectively, for contract number 7044. Eckerd listed both recidivism rates in its Data Sheet for RFP P2303 under the "2004-2005 Recidivism Rate." Mr. Hatcher averaged the recidivism rates for contract number 7044 resulting in a single recidivism rate of 25%. This figure was used in the Spreadsheet to calculate the CSR.

27. The Data Sheet submitted by Eckerd for RFP P2303 also contains two boxes at the bottom of the page that contain statements indicating that each circuit was reported separately and that the cell contains both circuits. The boxes have arrows that point to the relevant combined data cells in the "Number of Completions" and "2004-2005 Recidivism Rate" columns. The information contained in the data cells was derived from the 2006 CAR, which listed separate data for the Tenth and Twelfth Judicial Circuits even though the services provided were through a single contract.

28. Eckerd has also submitted responses for other requests for proposals, RFP P2028, RFP P2032, and RFP P2034, using the same data for each Data Sheet as it used for the Data Sheet submitted for RFP P2303.

29. On February 15, 2010, the Department changed its policy on the scoring methodology to be used in procurements such as the one at issue. The change in policy was expressed in an addendum to RFP P2062. The addendum stated in part:

If the 2008 CAR Report lists a program with more than one recidivism percent, list all of the percentages and the number of completions for the program on Attachment C [Data Sheet], and the Department will be treating a Provider's program with more than one recidivism rate as separate programs for the purposes of calculating success rate and will not be averaging the programs. The Department verifies all program information from the CAR Report.

30. This change in policy was in response to the anticipated changes to the 2009 CAR, which will report and identify multiple areas of information, including more programs with several separately reported recidivism rates. The change in policy was implemented upon evaluation of the 2009 CAR and in anticipation of the release of the 2009 CAR.

31. Eckerd claims that the policy of averaging recidivism percentages for contracts in which the CAR lists more than one recidivism rate resulted in an inaccurate recidivism percentage for White's contracts for the Second and Fourth Judicial Circuits. For example, in the Fourth Judicial Circuit, the recidivism rate for Duval County was 38%, and the recidivism rate for Nassau County was 0%. Eckerd contends that the multiple recidivism rates as calculated from the CAR should have

been used in the Spreadsheet rather than an average of multiple recidivism rates for a single contract. When the recidivism rate that is calculated from the CAR report for Duval County is used, the number of youth reoffending is 87.4, and the number of youth reoffending in Nassau County is 0%. When the average recidivism rate of 19% is used for Duval and Nassau Counties, the number of youth reoffending drops to 44.08, which is not an accurate accounting of the actual number of youth who reoffended. When the recidivism rate is lowered, the success rate will rise. Therefore, if the method espoused by Eckerd was used, White would have received a 71.9 score for CSR, resulting in a decrease of the points awarded to White of 16 points for CSR and a corresponding decrease in the total points awarded to White. Using Eckerd's methodology, Eckerd would have received the highest number of points.

CONCLUSIONS OF LAW

32. 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.

33. 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.

34. 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)

35. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931), 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.

36. 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."

37. Eckerd has the burden to establish the allegations in the Petition by a preponderance of the evidence. Department of

Transportation v. Groves-Watkins, 530 So. 2d 912, 913-914 (Fla. 1988). Eckerd has alleged that the Department incorrectly scored White's CSR by averaging the recidivism percentages for the Second and Fourth Judicial Circuits.⁶

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

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. 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. 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.

39. Although the methodology which the Department used to calculate the CSR by averaging recidivism rates for multiple programs in a judicial circuit was not set forth in the RFP, it was not a new methodology and had been used for many requests for proposals, including ones for which Eckerd submitted proposals. Eckerd had submitted Data Sheets for other requests for proposals in which multiple recidivism rates were listed on

the same line and averaged by the Department in calculating the CSRs for Eckerd.

40. Eckerd argues that it did not contest the intended awards for the other requests for proposals because the use of the methodology did not make a change in the scoring which would give Eckerd the highest number of points. This argument begs the question of when the methodology should have been protested. If Eckerd thought that the methodology that had historically been used was not the appropriate way to calculate CSRs, Eckerd should have protested the methodology within 72 hours of the release of the RFP rather than wait to see if the methodology would make a difference in the scoring. If the Department had departed from its long-standing policy of averaging recidivism rates, Eckerd would have a valid protest that the Department had evaluated the proposals contrary to the Department's policies.

41. Having failed to protest the methodology within 72 hours of the issuance of the RFP, Eckerd has waived any objections to the use of the Department's long-standing policy of averaging recidivism percentages for contracts that may span more than one county such as contract number D7102 and for contracts with more than one program such as contract number P2028 for the Second Judicial Circuit.

42. Assuming, arguendo, that Eckerd has not waived its objections to the methodology for computing the CSRs, Eckerd has

failed to show the methodology is contrary to the RFP. The RFP defines CSR as the percentage of youth who do not recidivate and states that points will be awarded on the combination of successful youth program completions and the percentage of youth who do not recidivate. The RFP does not state exactly how the CSR will be calculated such as using the formulas that are contained in the Spreadsheet, but Eckerd was familiar with the methodology that had been used in the past.

43. Eckerd has failed to show that the methodology for calculating CSRs is contrary to the governing statutes of the Department, the Department's rules, or the Department's policies. In fact, the use of a methodology other than the one used for the RFP would have been contrary to the Department's policy of calculating CSRs that the Department had used for several years.

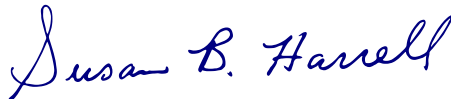
44. The methodology used by the Department is neither arbitrary nor capricious. The Department had given some thought to coming up with a way to have one recidivism rate for a contract that had multiple recidivism rates reported by the CAR. It may not be the most desirable method, but there is no evidence that it is an unreasonable method for calculating CSRs. The methodology is not contrary to competition. The same methodology was used for the evaluation of all proposals. The

methodology was not used to give an unfair advantage to a certain proposer over the other proposers.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered dismissing the Petition filed by Eckerd.

DONE AND ENTERED this 28th day of April, 2010, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 2010.

ENDNOTES

^{1/} References to the 2008 Florida Comprehensive Accountability Report will generally be "CAR," and the CAR for any other year will be identified by the year of issuance.

^{2/} White erroneously listed the combined number of total releases for the two programs, 81, rather than the combined number of youth completing the program, 48. This mistake was corrected by the Department as provided in the RFP.

^{3/} White included the combined releases, 266, on the Data Sheet. This number was corrected pursuant the RFP to the combined number of completions, 232.

^{4/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

^{5/} The maximum number of points that could be awarded per category may have differed, but the methodology in calculating the scores remained the same.

^{6/} Eckerd had raised issues concerning whether all of the appropriate programs had been listed and considered in the CSR, but counsel for Eckerd stated at the final hearing that those issues were abandoned.

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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.