

STATE OF FLORIDA

DEPARTMENT OF JUVENILE JUSTICE

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DIVISION OF
ADMINISTRATIVE
HEARINGS

TROY FOUNDATION, INC.,)
)
Petitioner,)
)
v.)
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent.)
_____)

DJJ Case No.: 10-0053

DOAH No.: 10-0536BID

FINAL ORDER

This matter is now before the undersigned for issuance of final agency action in regard to the Petitioner's challenge to a proposed award to Psychotherapeutic Solutions of Florida, Inc., (hereafter "PSF") the winning bidder in Request for Proposals P2059 (the RFP), concerning a contract for a 36-slot, facility-based day treatment program in Miami-Dade County. The protest was conducted pursuant to section 120.57(1) and (3), Florida Statutes, with a formal hearing held on October 5, 2010, before Administrative Law Judge Claude B. Arrington, in Tallahassee, Florida.

A "Recommended Order" was entered on December 1, 2010, which is attached and incorporated within this Final Order. Pursuant

to section 120.57(3)(e), Florida Statutes, the parties were allowed 10 days within which to submit written exceptions. Petitioner, TROY Foundation, Inc. (hereafter "TROY") timely filed exceptions. The Respondent (hereafter, "Department") did not file exceptions

Findings of Fact

The Department adopts the "Findings of Fact" set out in paragraphs 1 through 28 of the Recommended Order.

Conclusions of Law

The Department generally accepts the "Conclusions of Law" set out in paragraphs 29 through 40 of the Recommended Order. There, the ALJ concluded, based upon the facts presented, that TROY failed to establish that the Department's method of evaluating past performance was arbitrary, capricious, contrary to competition, or clearly erroneous.

Exceptions¹

1. TROY's first exception appears to be directed at paragraphs 24, 34 and 35, all of which address the scoring of past performance in the RFP. Specifically, TROY argues that the

¹ Section 120.57(1)(k), Florida Statutes, requires that exceptions "clearly identify the disputed portion of the recommended order by page number or paragraph," and an agency need not rule on exceptions that fail to do so. Although the Petitioners' exceptions are deficient in this regard, the undersigned has attempted to identify, where possible, the source of the exception.

Department should not have awarded past performance points for PSF's diversion and juvenile assessment center programs, because these should not have come within the definition of "non-residential programs" to be properly scored as past performance. In support of its position, TROY submitted Department administrative code provisions and policy handbooks to demonstrate that diversion programs were not similar to non-residential, day treatment programs that were the subject of the RFP.

The exception is denied. The ALJ correctly cited Footnote 3 of Attachment C of the RFP addressing past performance, which specifies that diversion programs and juvenile assessment centers could be scored for past performance. (RO.¶24; Joint Exhibit 1, p.21). TROY's assertion that this was inappropriate, and conflicted with rule definitions, is a complaint directed at the terms, conditions and specifications of the RFP itself and, as the ALJ correctly concluded in paragraphs 34 and 35, was one that TROY was required to bring as a challenge to the solicitation document.

The Department scored past performance precisely as it said it would in the RFP, allowing juvenile assessment centers and diversion programs to be scored as non-residential. If TROY disagreed, and wished to contest the RFP's broad definition of "non-residential," then it was required to bring its challenge to the RFP within 72 hours of its issuance on September 21, 2009.

See § 120.57(3)(b), Fla. Stat. (2009). This would have allowed the Department to correct or clarify the RFP prior to accepting bids, thus saving expense to the bidders and assuring a fair competition. See Consultech of Jacksonville, Inc. v. Dept. of Health, 876 So.2d 731, 734 (Fla. 1st DCA 2004). Instead, TROY participated in the procurement, and only raised the issue after the bids were submitted, were opened and scored, and an unfavorable outcome was obtained.

2. TROY's second exception appears to be directed at paragraphs 26-28 and 38-40. Here, TROY contends that its January 13, 2010 meeting with representatives of the Department culminated in "official agency action," and a decision "to uphold the award without the slightest compliance with the Sunshine Law." (Petitioner's Exceptions, pp. 4, 5).

The ALJ rejected TROY's assertion that the meeting was an ad hoc advisory group involved in the decision-making process whose activities were subject to the Sunshine Law. Specifically, the ALJ noted that the meeting was held pursuant to section 120.57(3)(d)1., Florida Statutes, to provide an opportunity to resolve the already-filed bid protest "by mutual agreement between the parties." (RO.¶26). The purpose was to determine the factual and legal basis for the protest, and no vote was ever held. (RO.¶27).

The exception is denied. On December 18, 2009, the Department posted its Notice of Agency Action indicating its

intent to award the contract to PSF. TROY's formal written protest was timely filed on December 28, 2009 (RO.¶¶5-6). Upon receipt of the formal protest, the Department stopped the contract award process pending resolution of the protest. § 120.57(3)(c), Fla. Stat. (2009). In accordance with section 120.57(3)(d)1., the Department provided an opportunity to resolve the protest by mutual agreement of the parties in a meeting with TROY representatives on January 13, 2010. (RO.¶¶7-8).

As noted by the ALJ, and supported by testimony, Department representatives listened to what TROY's representatives had to say, and determined whether additional information was needed. No vote was taken. (T.79, 102, 107-08; RO.¶¶11, 40). This supports the ALJ's determination that Department representatives were engaged in information-gathering or fact-finding at the January 13 meeting, and were not a decision-making advisory group subject to the Sunshine Law. See Sarasota Citizens for Responsible Government v. City of Sarasota, 35 Fla. L. Weekly S627 (Fla. Oct. 289, 2010).

Order

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

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

Entered this 28 day of December, 2010, in

Tallahassee, Florida.



FRANK PETERMAN JR., Secretary
Department of Juvenile Justice

Chakita Jenkins

Chakita Jenkins, Agency Clerk

Filed this 28th day of
December, 2010

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Notice of Right to Judicial Review

In accordance with the provisions of section 120.68, Florida Statutes, a party who is adversely affected by this Final Order is entitled to judicial review. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing a notice of appeal with the Agency Clerk, Office of the General Counsel, 2737 Centerview Drive, Suite 3200, Tallahassee, Florida 32399-3100, and a copy, accompanied by filing fees prescribed by section 35.22, Florida Statutes, with the First District Court of Appeal, or with the District Court of Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.