

STATEMENT OF THE ISSUES

Whether, in making a preliminary decision to award a contract for the subject services, Respondent acted contrary to a governing statute, rule, policy, or project specification; and, if so, whether such misstep(s) was/were clearly erroneous, arbitrary or capricious, or contrary to competition. Specifically, Petitioner challenges the evaluation of the past performance section of the responses to the procurement document. Also at issue is whether Respondent violated the Sunshine Law in deciding to reject Petitioner's bid protest.

PRELIMINARY STATEMENT

On September 21, 2009, Respondent, the Department of Juvenile Justice (the Respondent or DJJ) issued Request for Proposals #P2059 (the RFP). Following appropriate publication of the RFP and a vendors' conference, Petitioner, and another vendor, Psychotherapeutic Services of Florida, Inc. (PSF), responded. Following an evaluation of the responses, Respondent determined to award the subject contract to PSF. Petitioner thereafter timely filed this challenge to the proposed award, the matter was referred to DOAH, and this proceeding followed. PSF did not participate in this proceeding.

Prior to the formal hearing the parties submitted a Prehearing Stipulation, which contained certain stipulated facts. Those facts have been incorporated as findings of fact

(after minor editing) in paragraphs 1-18 of this Recommended Order.

At the formal hearing, the parties submitted one Joint Exhibit (Joint Exhibit 1). In addition, Petitioner presented eight sequentially-numbered exhibits, each of which was admitted into evidence. Petitioner presented the testimony of Jennifer Fiorenza (the former executive director of Petitioner who, at the time of the formal hearing, was employed by Petitioner as a consultant), Thomas Petersen (the Chairman of the Board of Petitioner), Tonja Mathews (counsel for Respondent who was called as a fact witness), Shahin Iranpour (Respondent's Contract Administer for the subject procurement), Amy Johnson (Respondent's Chief of Contracts), and Rex Uberman (Respondent's Assistant Secretary). In addition, Petitioner recalled Mr. Petersen as a rebuttal witness.

Respondent offered seven sequentially-numbered exhibits, each of which was admitted into evidence, and presented the testimony of Paul Hatcher (Respondent's Senior Management Analyst who scored the vendors' past performance section of the responses to the RFP).

A Transcript of the proceedings, consisting of one volume, was filed October 20, 2010. Each party filed a Proposed Recommended Order, which has been duly-considered by the

undersigned in the preparation of this Recommended Order. All statutory references are to Florida Statutes (2010).

FINDINGS OF FACT

Stipulated Facts

1. Respondent is an agency of the State of Florida and is the procuring agency in this proceeding.

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

3. On September 21, 2009, the Department issued the subject RFP. The RFP sets forth the purpose of the procurement (on Page 1 of the RFP) as follows:

Request for Proposals (RFP): A 36-slot Facility-Based Day Treatment Program as described in the Services to be Provided (Attachment I) in a Provider owner/leased facility in Circuit 11, Miami-Dade County. The provider shall provide the day treatment program for youth placed on probation, and youth transitioning back into the community who are referred for conditional release or post-commitment probation services. The provider shall design, develop, implement and operate an evidence-based, facility-based day treatment program with the capability to provide an after-school/evening component.

4. Petitioner submitted a timely response to the RFP.

5. On December 18, 2009, Respondent posted its Notice of Agency Action which indicated its intent to award the contract to PSF.

6. On December 28, 2009, Petitioner filed a Formal Written Protest and Petition for Administrative Hearing (Petition) pursuant to Section 120.57(3), Florida Statutes (2009), and Florida Administrative Code Rule 28-110.004.

7. Pursuant to the provisions of Section 120.57(3) (d), Florida Statutes (2009), representatives from Petitioner and Respondent met in an attempt to settle or to resolve the formal bid protest filed by Petitioner.

8. Respondent's representatives at the January 13, 2010, meeting included Tonja W. Matthews, Amy Johnson, Paul Hatcher, and Shahin Iranpour.

9. Petitioner's representatives at the January 13, 2010, meeting were Thomas Petersen and Jennifer Fiorenza.

10. No public notice was given ahead of, and no minutes were taken at, the meeting between Petitioner's representatives and Respondent's representatives on January 13, 2010.

11. Respondent's representatives briefly met separately after hearing from Petitioner to determine whether or not any further questions or information was needed from Petitioner.¹

12. After January 13, 2010, and before January 21, 2010, Respondent's representatives Amy Johnson, Rex Uberman, and Paul Hatcher individually or collectively discussed Petitioner's Bid Award Protest with some or all of the Respondent's personnel present at the January 13, 2010, meeting with Mr. Petersen and

Ms. Fiorenza. They ultimately decided to uphold Respondent's Notice of Agency Action (issued December 18, 2009) as to the subject RFP.

13. No public notice was given of the proposed agency action, i.e., Respondent's intended decision to uphold its Notice of Agency Action as to the subject RFP, nor were minutes taken which recorded this intended action.

14. In a letter dated January 21, 2010, Respondent notified Petitioner of its decision to uphold its decision to award to PSF and inquired as to whether Petitioner wished to proceed with a formal hearing before DOAH.

15. Petitioner responded in the affirmative, Respondent forwarded the Petition to DOAH, and this proceeding followed.

Past Performance

16. Section XIX of Attachment B sets forth "General Instructions for Preparation of the Proposal." Subparagraph F of Section XIX (found at page 17 of 73 of Joint Exhibit 1) provides, in part, as follows:

F. Past Performance - (Volume 3)

1. The purpose of this section is for the prospective Provider to demonstrate its knowledge and experience in operating similar programs by providing information requested on Attachment C, part I, II, and/or III.
2. Each prospective Provider shall limit the Past Performance section to no more than 15 pages. These pages shall include the information requested on Attachment C, Parts

I, II, and/or III and all required supporting documentation. . . .

17. Attachment C, Part 1, is a form styled "Data Sheet: Past Performance of Non-Residential Programs" (page 21 of 73 of Joint Exhibit 1). That form has column headings for the vendor to insert the required information as follows: "Program Name," "Contract Number," "Program Type," "Contract Begin Date," "Contract End Date," "Most Recent QA Performance Percentage Score," "Most Recent QA Compliance Percentage Score (if evaluated prior to 2007)," "Failure to Report," "Number of Completions during FY 2006-2007," "2006-2007 Recidivism Rate," "QA Deemed Status." Each column heading has a footnote that clarifies the type information required. For example, a footnote explains that QA is a reference to Quality Assurance.

18. The column headed "Program Type" contains a footnote (footnote 3) which sets forth the non-residential programs that qualify for evaluation under the category "Past Performance of Non-Residential Programs" as follows:

3. During the past year from the date of the RFP issuance, the program type (Supervision, Day Treatment, Conditional Release, Respite, Independent Living, Diversion, Juvenile Assessment Centers) for the majority of the time the Vendor operated the program.

19. Footnote 3 explicitly sets forth Diversion Programs and Juvenile Assessment Centers (JAC) as programs that will

qualify for evaluation under the category "Past Performance of Non-Residential Programs."

20. Petitioner did not file a challenge to the specifications of the procurement document within 72 hours of its posting as required by Section 120.57(3)(b), Florida Statutes.

21. The scoring criteria and methodology for Past Performance are set forth in the RFP. Petitioner and PSF only operate programs in Florida. The scoring at issue in this proceeding is that of "Part I - Evaluation for Past Performance in Florida". Under that category, a vendor could receive a maximum of 420 points.

22. Paul Hatcher is Respondent's employee who evaluated the responses to the Past Performance section of the RFP.

23. Petitioner is the current provider of the services being solicited by the subject RFP. In its response to Attachment C, Petitioner listed that program in the appropriate columns of Attachment C. The program operated by Petitioner was appropriately listed because it is categorized by Respondent as being a non-residential program. There is no contention that Mr. Hatcher failed to appropriately evaluate Petitioner's Past Performance. Petitioner was awarded a total of 268 points under the Past Performance category, Part I - Evaluation for Past Performance in Florida.

24. In its response to Attachment C, PSF listed one diversion program and two juvenile assessment centers (JAC) as non-residential programs it operated in the State of Florida. One JAC did not qualify for evaluation because it had not been in operation for a sufficient period of time. Mr. Hatcher evaluated PSF's Past Performance on the basis of the diversion program and one of the two JACs. PSF was awarded a total of 312 points under the Past Performance category, Part I - Evaluation for Past Performance in Florida. Mr. Hatcher appropriately included the diversion program and the JAC program in his evaluation of PSF's Past Performance for Non-Residential Programs because Footnote 3 explicitly includes those programs as programs non-residential programs that qualify for evaluation.² There is no contention that Mr. Hatcher failed to score PSF's Past Performance in accordance with the scoring criteria and methodology set forth in the RFP.

25. The RFP provides that vendors who operate DJJ contracted non-residential programs in Florida can be awarded a maximum of 1905 points. Respondent awarded PSF the higher overall score of 1422.27 points. Respondent awarded Petitioner a score of 1327.34 points. Petitioner failed to establish that Respondent incorrectly scored the two responses to the RFP, and it failed to establish that Respondent incorrectly determined to award the procurement to PSF.

Sunshine Law

26. Section 120.57(3)(d)1., Florida Statutes, provides the following after a bid protest is filed:

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

27. The purpose of the meeting on January 13, 2010, between the employees of Respondent and the representatives of Petitioner identified above, was to provide Petitioner an opportunity to argue why PSF should not be awarded the procurement. The group of employees represented Respondent's legal counsel and representatives from Respondent's Probation Programs (headed by Mr. Uberman) and its Bureau of Contracts (headed by Ms. Johnson). The purpose of the meeting was to determine the factual and legal basis for Petitioner's bid protest. The group of Respondent's employees who met with Petitioner's representatives on January 13, 2010, did not vote either during the meeting or after the meeting's conclusion.

28. A day or two before she wrote her letter of January 21, 2010, Ms. Matthews contacted by telephone Ms. Johnson to determine whether the Bureau of Contracts thought some action other than the award of the procurement to PSF should be taken. Ms. Matthews also contacted by telephone

Mr. Hatcher, who represented the Probation Programs, with the same inquiry. Ms. Johnson made the decision that the position of the Contract division was to uphold the award to PSF. Mr. Hatcher, after consulting with Mr. Uberman, made the decision that the position of the Probation Programs was to uphold the award to PSF. In separate telephone calls the Contract division and the Probation division advised Ms. Matthews that the award to PSF should be upheld. Ms. Matthews thereafter prepared and sent the letter that advised the vendors of the DJJ's decision.

CONCLUSIONS OF LAW

29. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes, and the parties have standing.

30. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action, here Troy Foundation. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Troy Foundation must sustain its burden of proof by a preponderance of the evidence. Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

31. Section 120.57(3)(f), Florida Statutes, spells out the

rules of decision applicable in bid protests. In pertinent part, the statute provides:

In a competitive-procurement protest, other than a rejection of all bids, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

32. The foregoing requires the party protesting the intended award to identify and prove, by the greater weight of evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either:

- (a) contrary to the agency's governing statutes;
- (b) contrary to the agency's rules or policies; or
- (c) contrary to the bid or proposal specifications.

Further, the protester must establish that the agency's misstep was:

- (a) clearly erroneous;
- (b) contrary to competition; or
- (c) an abuse of discretion.

33. The First District Court of Appeal has construed the term "de novo proceeding," as used in Section 120.57(3)(f), Florida Statutes, to "describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to

evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609. In deciding State Contracting, the court followed Intercontinental Properties, Inc. v. State Dep't of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA 1992), an earlier decision—it predates the present version of the bid protest statute—in which the court had reasoned:

Although the hearing before the hearing officer was a *de novo* proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo*. Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria . . . have been satisfied.

34. Turning to the merits of this case, it is concluded that Petitioner has failed to meet its burden as to Respondent's evaluation of the vendors' Past Performance. Petitioner's challenge to the bid process should have been brought as a challenge to Footnote 3, which designated the programs that Respondent considered to be similar and suitable for evaluation. Section 120.57(3)(b) provides, in relevant part, as follows:

(b) . . . 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. . . .

35. As reflected in the Findings of Fact section of this Recommended Order, Troy Foundation did not challenge the terms, conditions, and specifications contained in the solicitation document. Pursuant to Section 120.57(3)(b), Florida Statutes, that failure constituted a waiver of such a challenge. See Consultech of Jacksonville, Inc. v. Dept't of Health, 710 So. 2d 731 (Fla. 1st DCA 2004), Optiplan Inc. v. School Bd. Of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1988), and Capeletti Brothers, Inc. v. Dep't of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986). Footnote 3 clearly provided that for the purposes of the procurement, a diversion program qualified for evaluation of a vendor's past performance as a program similar to the program operated by Petitioner and as a program similar to the other types programs listed in the footnote.

36. Petitioner's challenge to the scoring of the vendors' past performance should be rejected.

37. Petitioner alleged that Respondent violated Section 286.011, Florida Statutes, when the Respondent's employees met with representatives of the Petitioner and thereafter conducted a series of private discussions that culminated in the decision to affirm the award of the procurement to PSF. Section 286.011(1), Florida Statutes, provides as follows:

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

38. The group of DJJ employees who met with representatives of Petitioner on January 13, 2010, was not a board or commission within the meaning of Section 286.011(1), Florida Statutes.

39. Petitioner correctly argues that committees, even ad hoc committees, can be subject to the Sunshine Law if the committee is an advisory committee that is part of the decision-making process. The Sunshine Law was enacted to prevent "closed doors politics." Because it was enacted for a remedial and protective purpose, as the Florida Supreme Court explained in

Ward v. Marston, 442 So. 2d 934, 938 (Fla. 1983), the law must be broadly construed.

40. Here, the group of DJJ employees who met with representatives of Petitioner on was there to ascertain the factual and legal basis for Petitioner's bid protest. The group did not vote during or after the meeting. A committee is not subject to the Sunshine Law if the committee has only been delegated information-gathering or fact-finding authority and only conducts such activities. See Sarasota Citizens for Responsible Gov't v. City of Sarasota, 2010 Fla. Lexis 1787, 35 Fla. L. Weekly S 627, at page 15 of the opinion (October 28, 2010) (A group that obtained and delivered information to a decision-maker was not subject to the Sunshine Law). Because the group at issue in this proceeding was a fact-finding group, as opposed to an advisory group, the meeting(s) challenged by Petitioner was not subject to the Sunshine Law and, consequently, no Sunshine Law violation occurred.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Department of Juvenile Justice enter a final order that denies Petitioner's bid protest and upholds the award of the procurement to PSF.

DONE AND ENTERED this 1st day of December, 2010, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of December, 2010.

ENDNOTES

¹ The stipulated fact in the Prehearing Order is as follows:
"The Respondent will agree to the likelihood that the
Respondent's representatives briefly met separately after
hearing from the Petitioner to determine whether or not any
further questions or information was needed from the
Petitioner." The stipulated fact has been modified to reflect
the greater weight of the credible evidence.

² In reaching this finding, the undersigned has carefully
considered Petitioner's argument that a Diversion program is not
a non-residential program. The undersigned has also considered
the authority cited by Petitioner in support of its argument.
The undersigned is constrained to reject that argument because
the RFP clearly sets forth in footnote 3 that a diversion
program qualifies as a non-residential program for the purposes
of the RFP. Petitioner argues that a diversion program is not
similar to the type of program it operates within the meaning of
Subparagraph F of Section XIX (found at page 17 of 73 of Joint
Exhibit 1). Petitioner's conclusion is that Respondent erred by
including PSF's diversion program for the evaluation of Past
Performance. (The foregoing is meant to be a succinct statement
of Petitioner's arguments.) Petitioner's arguments challenge
the specifications of the RFP, specifically the language of

Footnote 3. Those challenges should have been brought in a challenge to the specifications of the procurement document pursuant to Section 120.57(3)(b), Florida Statutes. As discussed in the Conclusions of Law section of this Recommended Order, Petitioner cannot challenge the specifications of the procurement document in this proceeding.

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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.