STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PSYCHOTHERAPEUTIC SERVICES OF FLORIDA, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 10-6279BID
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 December 14, 2010, in Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the evaluators of the subject request for proposals (RFP) were qualified under the applicable law and RFP criteria to evaluate the proposals.

PRELIMINARY STATEMENT

On November 23, 2009, Respondent, Department of Juvenile Justice (Department or Respondent), issued RFP #P2602 to select providers to operate Intensive Delinquency Diversion Services (IDDS) programs for youths in 16 different judicial circuits around the state. Respondent evaluated and ranked, by circuit proposals submitted to operate IDDS programs in each circuit, and issued its notices of intent to award contracts based on its evaluations.

For Judicial Circuit 17, Broward County, Respondent evaluated four competing proposals, and on March 2, 2010, Respondent issued its notice of intent to award a contract to The Henry and Rilla White Youth Foundation (White Foundation or Intervenor), which submitted the highest-ranked proposal to operate an IDDS program in Circuit 17. Petitioner, Psychotherapeutic Services of Florida, Inc. (Petitioner),

submitted a competing proposal to operate an IDDS Program in Circuit 17. Petitioner's proposal was ranked third, behind both White Foundation's proposal and a proposal submitted by Juvenile Services Program, Inc. Petitioner timely filed a notice of intent to protest, followed by a formal written protest and petition for administrative hearing pursuant to section 120.57(3), Florida Statutes (2009),[1/] to protest Respondent's intended award for Circuit 17.

On July 27, 2010, the petition was forwarded to the Division of Administrative Hearings for the assignment of an Administrative Law Judge. The case was initially assigned to Administrative Law Judge J.D. Parrish, who set the matter for final hearing. Petitioner and Respondent jointly moved for a continuance and waived the statutory hearing timeframe. The motion was granted, and the final hearing was rescheduled for December 14, 2010, in accordance with the parties' request.

White Foundation filed its Petition to Intervene on November 10, 2010, which was granted by Order dated November 15, 2010. No separate protests were filed by the second-ranked proposer or by the fourth-ranked proposer, and those competing proposers did not seek to participate as parties in this proceeding.

The parties filed a Joint Pre-hearing Stipulation on December 10, 2010, and stipulated to certain findings of fact.

To the extent relevant, those stipulated facts are incorporated into the Findings of Fact in this Recommended Order.

On November 30, 2010, Intervenor filed a Motion to Relinquish Jurisdiction asserting that Petitioner, as the third-ranked bidder, lacked standing to challenge the contract award to Intervenor because Petitioner did not also challenge the second-ranked bidder and that Petitioner did not timely challenge the bid specifications. Petitioner responded in opposition to the motion, and a telephonic motion hearing was held on December 13, 2010. Judge Parrish entered an Order denying the motion, while limiting the scope of Petitioner's challenge as necessary because of Petitioner's status as third-ranked proposer, Petitioner's failure to challenge the responsiveness of the second-ranked proposal, and Petitioner's failure to challenge the bid specifications. As stated in Judge Parrish's Order:

> The only claim Petitioner alleged that requires a resolution of material fact, is whether the Department's evaluators were qualified under the applicable law and bid criteria to perform their duty in evaluating the submittals. If qualified, as the third bidder, Petitioner would not have standing to challenge the results of their computations since all three bidders were responsive.[2/]

The case was transferred to the undersigned, who conducted the final hearing as scheduled on December 14, 2010.

At the final hearing, Petitioner presented the testimony of Department employees Karen McNeal, Jeffrey Balliet, Elaine Atwood, Paul Hatcher, and Amy Johnson. Petitioner's Exhibits 1 through 3, 4 (pages 1 through 6 only), 5 (pages 1 through 6 only), and 8 were received into evidence. Respondent did not present the testimony of any witnesses; Respondent's Exhibit 1 was received into evidence. Intervenor did not present the testimony of any witnesses and did not offer any exhibits into evidence.

At the conclusion of the final hearing, the parties requested 20 days from the filing of the transcript in which to file their proposed recommended orders, and the undersigned agreed. The Transcript of the final hearing was filed on January 19, 2011. Each of the parties filed Proposed Recommended Orders,[3/] which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. On November 23, 2009, the Department issued RFP #P2062 (the RFP), requesting proposals from prospective providers to operate 16 IDDS programs in 16 different judicial circuits in Florida: Circuits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 17, 18, and 20.

3. The RFP's Statement of Services provided that proposers would be responsible for designing, implementing, and operating an IDDS program in each of the 16 listed judicial circuits. The RFP described an IDDS program as a diversion program targeting a specific population of juvenile offenders determined to be at risk of becoming serious and chronic offenders. The goal of IDDS is to facilitate a positive change in youth behavior and criminal thinking and provide the youth with the tools necessary to avoid recidivism or future criminal involvement. Prospective providers were instructed to propose services that included specified minimum components, including scheduling, supervision, and monitoring of compliance with court-ordered sanctions, such as community service, curfew, and restitution; random urinalysis monitoring; provision of counseling, anger management education, educational training, and vocation services to age-appropriate youth; and substance abuse prevention and treatment services.

4. The RFP provided that proposers were to submit a single response to address one or more circuits in which they intended to propose operating an IDDS program. However, if a prospective provider proposed to operate IDDS programs in more than one circuit, its response had to include separate sections on staffing, prices, and budgets for each circuit/program proposed.

5. The deadline to file challenges to the specifications of the RFP was within 72 hours of its posting. No challenges to

the RFP's specifications were filed within the required 72-hour window.

6. Petitioner, Intervenor, and two other proposers' timely submitted proposals to operate an IDDS program in Circuit 17, in response to the RFP.

7. Following its evaluation of proposals, on March 2, 2009, Respondent posted its notice of agency action, indicating its intent to award the contract in Circuit 17 to Intervenor, whose proposal received the highest score of 1549.78 points. Juvenile Services Program, Inc., was ranked second, with 1454.01 points. Petitioner was ranked third, with 1327.57 points. Lutheran Services of Florida, Inc., was ranked fourth, with 986.43 points.

8. Petitioner's timely challenge to Respondent's intended agency action in Circuit 17 is limited to the issue of whether the evaluators were qualified under the applicable law and RFP criteria to evaluate the proposals.

9. The standard established by "the applicable law," section 287.057(17), Florida Statutes, is that the agency must appoint "[a]t least three persons to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought."

10. The RFP criteria contain the following in the RFP Addendum, in the form of a question from a prospective provider and Respondent's answer:

> Q: Who will be evaluating the proposals[?] Will they be fully knowledgeable about IDDS programs and how they are run[?]
>
> A: The proposal will be evaluated by a team of DJJ staff who are fully knowledgeable about IDDS programs and how they are run. These people are chosen for their particular skills, knowledge and experience. They have also been chosen because of the Department's confidence in their ability to score proposals both independently and fairly.

11. Amy Johnson, Respondent's chief of contracts, has the responsibility for supervising the Department's contracting and procurement process and ensuring compliance with section 287.057.

12. The Department goes beyond the statutory requirements by specifically training potential evaluators in the competitive procurement process with a focus on the process itself, including evaluation and scoring of proposals. Ms. Johnson has in the past conducted this training and remains responsible for ensuring that evaluators are trained.

13. A number of years ago, Ms. Johnson developed an internal means of identifying potential evaluators who were considered qualified to evaluate specific program areas and

services that might be the subject of competitive procurements. This process involved identification by persons in charge of the various program areas of individuals they believed had sufficient experience and knowledge to evaluate certain types of programs and services. The program area representatives would submit names of individuals considered qualified to evaluate the various programs and services within their program area, along with a brief biographical statement describing the individuals' background and experience. Added to this substantive or programmatic categorization of potential evaluators was the qualification of having been trained in the competitive procurement process. Ms. Johnson developed a spreadsheet to maintain the results of the two-step qualification process. The spreadsheet lists individuals with a summary of the information obtained from the program area representatives, including the categorization of the types of programs and services the individuals are considered qualified to evaluate based on their background and experience. The spreadsheet also identifies the most recent date on which each individual completed training in the competitive procurement process. The spreadsheet document has been maintained over time to keep the running results of the pool of evaluators identified through the two-step qualification process.

14. Elaine Atwood is the Department's contract administrator. She has assumed responsibility for conducting the training sessions for potential evaluators in the competitive procurement process, as well as the responsibility for maintaining the spreadsheet of the evaluator pool. Ms. Atwood served as the procurement officer for RFP #P2062. Her duties included working with the program area to put the RFP together, posting the RFP on the Department's website, receiving the proposals, and conducting all other activities that were part of the procurement process.

15. The "program area" for RFP #P2062 is the Office of Probation and Community Intervention, and Paul Hatcher was the designated program area representative. IDDSs are one category of services within the Probation and Community Intervention program area. Ms. Atwood worked with Mr. Hatcher to address programmatic issues for this RFP.

16. Mr. Hatcher identifies individuals who are considered qualified to conduct evaluations for RFPs involving programs or services falling under the umbrella of his program area. For the current pool of potential evaluators, Mr. Hatcher submitted names of individuals who were substantively qualified for programs and services falling under his program area and who could be placed on the evaluator pool spreadsheet for those categories of programs and services. However, Mr. Hatcher does

not select the individual evaluators for a particular RFP. That is because selection of evaluators for a particular RFP is, by design, a random process, using the information about evaluator qualifications that is maintained on the spreadsheet.[4/]

17. Responses to RFP #P2062 were submitted in three volumes: Volume One was the "technical" proposal setting forth the prospective provider's organizational structure and management capability, the proposed program services, and proposed staffing; Volume Two was the "financial" proposal, including the proposed price sheet and budget and the provider's Supplier Qualifier Report prepared by Dun & Bradstreet; and Volume Three was the "past performance" section to demonstrate the provider's knowledge and experience in operating similar programs.

18. Ms. Atwood conducted the review and scoring of the financial proposals in a fairly mechanical process of pulling out numbers from each cost proposal and, also, pulling Dun & Bradstreet numbers for the prospective providers and putting them on a spreadsheet. No evidence was presented that Ms. Atwood was not sufficiently qualified to conduct this review.

19. Mr. Hatcher conducted the evaluation of prospective providers' past performance. No evidence was presented that

Mr. Hatcher was not sufficiently qualified to conduct this review.

20. Three evaluators were randomly selected from the pool of potential evaluators designated for IDDS reviews to evaluate and score the "technical" component of responses to RFP #P2062: Karen McNeal, Jeffrey Balliet, and Cheryl Surls. Of these three evaluators, Petitioner presented the testimony of only the first two, and Petitioner directed its qualification challenge to only one, Ms. McNeal.

21. Ms. McNeal is employed in the Department's Probation program area. She is responsible for the oversight of the Duval Assessment Center that screens youth to determine their detention or release. She has held that position since July 1, 2009. Before that position, she was detention superintendent for the St. John's Juvenile Detention Center. She has been with the Department since October 2001. Before joining the Department, Ms. McNeal was a program analyst for ten years with the Department of Health and Rehabilitative Services.

22. Ms. McNeal went through a four-week juvenile probation officer certification course before assuming her current position in Probation. That Probation training course included a review of the various prevention programs falling under the probation program area umbrella, including IDDS. However,

Ms. McNeal does not have specific programmatic experience with IDDS.

23. Ms. McNeal had not previously served as an evaluator on an RFP, before this experience. In accordance with the Department's internal procedure, Ms. McNeal underwent training by Ms. Atwood in the competitive procurement process on November 17, 2009.

24. Mr. Balliet, the other member of the technical component evaluation team who testified, has held the position of contract manager for the Department since 2006. Before that time, he supervised a contract management unit at the district level and, also, served as assistant chief probation officer for Circuit 5, where he monitored compliance of IDDS programs in that circuit. Mr. Balliet has undergone training in the competitive procurement process multiple times.

25. Although Mr. Balliet has had specific experience with IDDS programs, he did not think that such specific experience was necessary to evaluate an RFP dealing with IDDS programs, if one had a background that would otherwise allow for an understanding of the process.

26. As noted above, the third evaluator on the three-person evaluation team for the technical component was Ms. Surls, who did not testify. Petitioner did not present any

evidence to establish that Ms. Surls was not qualified to serve as an evaluator.

27. Beyond the sheer difference in name of the particular services addressed by this RFP--IDDS versus other programs and services falling under the umbrella of the Probation and Community Intervention program area, Petitioner failed to establish that the experience and training Ms. McNeal has obtained over the years and, particularly, since assuming the oversight position for Duval Assessment Center, is not appropriate or sufficient to qualify her to evaluate proposals for IDDS. Petitioner presented no evidence that the components of an IDDS program are substantively dissimilar from the components of the services and programs in which Ms. McNeal has attained direct experience and training or that staffing considerations are dissimilar.

28. Petitioner's case began and ended with the fact that Ms. McNeal has no direct experience, specifically with IDDS programs, and that Ms. McNeal had not previously evaluated proposals submitted in response to an RFP. The record does not reveal whether there would be any other Department employees, besides Mr. Balliet, who had direct experience specifically with IDDS programs and who, also, had evaluated proposals for an RFP before. Imposing either or both of these requirements for potential evaluators could serve as an impossibly restrictive

hindrance to an agency trying to follow the competitive procurement process while also carrying out the agency's functions.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat. (2010).

30. Section 120.57(3)(f) 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.

31. The court in Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "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.)

32. 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, 723-724 (Fla. 1931) as follows:

> [T]he 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.

33. A capricious action has been defined as an action, "which is taken without thought or reason or irrationally." Agrico Chemical Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. den. 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) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to

progress from consideration of these factors to its final decision." Adam Smith Enterprises v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 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."

34. Although competitive-procurement protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo is contemplated than for other substantial-interest proceedings under section 120.57. Competitive-procurement protest hearings are a "form of intra-agency review," in which the object is to evaluate the action taken by the agency. State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

35. The scope of this proceeding is further limited by the limited predicate upon which Petitioner is able to demonstrate standing, i.e., that Petitioner's substantial interests will be adversely affected by the agency action it seeks to challenge. Petitioner's standing is limited by its status as third-ranked proposer and its failure to challenge both of the proposals ranked higher than Petitioner's proposal, as previously

addressed in the Order Denying Motion to Relinquish Jurisdiction entered before the final hearing in this case.

36. In a competitive-procurement protest, it is generally accepted that the second-ranked bidder has a substantial interest that is adversely affected by an agency's decision to award a contract to the highest-ranked bidder, because had the award not gone to the highest-ranked bidder, it would have gone to the second-ranked bidder. Silver Express Co. v. Dist. Bd. of Trs. of Miami-Dade Cmty. Coll., 691 So. 2d 1099 (Fla. 3d DCA 1997). Petitioner cannot demonstrate a similar substantial interest here, because Petitioner is only the third-ranked bidder, and Petitioner has not challenged both higher-ranking proposals. Thus, Petitioner lacks standing to challenge the merits of Respondent's actions in scoring Intervenor's proposal higher than Petitioner's, because even if Petitioner were correct, Petitioner would not, thereby, be entitled to the contract award.

37. As determined before the final hearing, Petitioner only has standing to pursue the one challenge it raised that is directed to the RFP process itself--whether the evaluators qualified under the law and the RFP criteria to evaluate the proposals. Petitioner's contention is that one of the three evaluators was not qualified, thus, undermining the evaluation

process and rendering the decision based on that process clearly erroneous, contrary to competition, arbitrary, and capricious.

38. The relief sought by Petitioner is to reject all proposals and reinitiate the RFP process. The relief sought would adversely affect Intervenor's substantial interests, Intervenor has standing.

39. Section 287.057(17)(a) provides that if the value of a contract will exceed $150,000, then the agency must appoint "at least three persons to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought."

40. Petitioner has failed to meet its burden of proving that the team of three evaluators that reviewed and scored the technical, programmatic proposals collectively lacked experience and knowledge in the program areas and service requirements at issue. The ordinary meaning of the word "collectively" would require an aggregation or combination of the individual experience and knowledge of the team members; Petitioner offered no different interpretation. Petitioner's attempt to prove a violation of this statutory requirement failed upon Petitioner's inability to prove the experience and knowledge of Ms. Surls, the evaluator who did not testify. Petitioner's failure of proof was heightened by the testimony of Mr. Balliet, who

demonstrated specific experience and knowledge of IDDS programs; Petitioner has never argued otherwise.

41. Instead, Petitioner's argument is predicated solely on its view that Ms. McNeal lacked the requisite experience and knowledge to evaluate IDDS proposals. But Petitioner failed to meet its burden to prove that Ms. McNeal's knowledge and experience in the "program area," Probation and Community Intervention, was insufficient to allow her to evaluate proposals for IDDS programs, which fall under the umbrella of the Probation program area. Petitioner did not present evidence establishing that the specific service requirements for IDDS programs are beyond the scope of Ms. McNeal's knowledge and experience attained within the Probation and Community Intervention program area and before her transfer to that program area.

42. Petitioner also points to the RFP Addendum in which Respondent answered a question by the second-ranked proposer and stating that the evaluation team members were "fully knowledgeable about IDDS programs" and were "chosen because of their particular skills, knowledge, and experience." Petitioner attempts to blend these two separate statements by asserting that Respondent committed to select evaluators who had particular skills, knowledge, and experience with IDDS

programs. That is not what Respondent stated in the RFP Addendum.

43. In terms of the actual RFP Addendum standard, Petitioner failed to prove that any evaluation team member was not fully knowledgeable about IDDS programs. Petitioner simply did not explore this issue, such as by delving into required components of an IDDS program to test an evaluator's knowledge of those components. Moreover, Petitioner failed to prove that any evaluation team member was not selected because of his or her particular skills, knowledge, and experience. The evidence suggests to the contrary--that this standard was met. Respondent has in place a reasonable process for identifying individuals qualified by their background and experience to evaluate various types of programs and services.

44. Petitioner has not met its burden of proof. The evidence does not establish that Respondent's selection of Ms. McNeal, Mr. Balliet, and Ms. Surls to serve as the evaluation team for the technical part of the proposals was clearly erroneous, contrary to competition, arbitrary, or capricious. Petitioner has provided no evidentiary basis for second-guessing Respondent's judgment or the manner in which Respondent exercised its discretion.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Department of Juvenile Justice, dismissing the Petition filed by Petitioner, Psychotherapeutic Services of Florida, Inc.

DONE AND ENTERED this 14th day of March, 2011, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

[2/] At the final hearing, Petitioner objected to the Order Denying Motion to Relinquish Jurisdiction, only insofar as it stated that Petitioner affirmatively acknowledged the responsiveness of the two proposals that were ranked higher than Petitioner's proposal. However, Petitioner conceded that it had not raised any issue challenging the responsiveness of either of the higher-ranked proposals in its petition and in the Joint

Pre-Hearing Stipulation and that the only issue to be litigated was whether the evaluators were qualified.

[3/] The Proposed Recommended Orders (PROs) were due on February 8, 2011. Petitioner and Intervenor timely filed their PROs on the deadline day. Respondent's PRO was fax-filed shortly after the close of business on February 8, 2011, and, thus, was docketed as filed on February 9, 2011. No party filed a motion to strike Respondent's slightly-late PRO.

[4/] Petitioner's proposed findings in its PRO confuse two distinct steps in the evaluator qualification and selection process: first, as part of the development of the evaluator pool spreadsheet, program area representatives, like Mr. Hatcher, submit names of individuals they believe are qualified to evaluate RFPs that might be issued for programs and services falling within their program areas; separately, evaluators qualified for the programs and services at issue in a particular RFP are selected randomly from the evaluator pool spreadsheet. Petitioner emphasized the fact that the person with programmatic expertise, Mr. Hatcher, did not select the actual evaluators for this RFP. But Mr. Hatcher does not select evaluators; his role is to identify qualified individuals who could evaluate proposals for the various services and programs within his program area. Mr. Hatcher testified that he performed that role with respect to the current pool of evaluators. Mr. Hatcher was not specifically asked whether he had identified the three individuals later selected to evaluate RFP #P2062 or whether he had designated them as qualified to evaluate IDDS; he was only asked whether he selected any of the evaluators to evaluate RFP #P2062.

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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.