

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUVENILE SERVICES PROGRAM,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 10-6280BID
)
DEPARTMENT OF JUVENILE JUSTICE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 11, 2011, in Tallahassee, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Tonja White Mathews, Esquire
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For Intervenor: Maureen McCarthy Daughton, Esquire
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STATEMENT OF THE ISSUES

The issues are whether the intended contract awarded to Intervenor, The Henry and Rilla White Foundation, Inc. (Intervenor or White), pursuant to Request for Proposals #P2062 (RFP) for an Intensive Delinquency Diversion Services (IDDS) program in Palm Beach County, Florida (Circuit 15), is contrary to Respondent's governing statutes, policies and rules, and the RFP. Petitioner, Juvenile Services Program, Inc. (Petitioner or JSP), timely challenged the intended award, and alleged that the award to Intervenor was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On November 23, 2009, Respondent, Department of Juvenile Justice (Respondent or Department), issued the RFP to solicit responses for multiple circuits within the state. An applicant could propose on one or more of the circuits with a timely response to the RFP. In this case, Petitioner and Intervenor timely submitted proposals for RFP #P2062 for Circuit 15. On March 2, 2010, Respondent posted a Notice of Agency Action (NOAA), which indicated that the Department intended to award the contract for the subject IDDS program to Intervenor. The scoring for the award put Petitioner second, and the instant bid protest timely followed.

The case was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings on July 27, 2010.

The final hearing was scheduled, but the parties jointly requested a continuance in the cause and agreed to waive statutory time guidelines for bid protests. Accordingly, the matter was rescheduled in accordance with the dates proposed by the parties. White was granted permission to intervene in the case on November 15, 2010.

On January 10, 2011, in accordance with the Pre-Hearing Order entered in this matter, the parties filed a Pre-Hearing Stipulation. Findings of fact addressed in the stipulation are incorporated within the findings below.

As a preliminary matter, a Motion in Limine filed by Intervenor was granted. The motion sought to exclude any testimony or evidence submitted that constituted a challenge to the RFP specifications. Consistent throughout this case has been the determination that Petitioner failed to timely challenge the specifications of the RFP and thereby waived any challenge to its terms or conditions. Whether Respondent followed the terms and conditions of the RFP remained at issue in the proceeding.

Petitioner presented testimony from Amy Johnson, Paul Hatcher, Elaine Atwood, Jeffrey Balliet, Cheryl Surls, Karen McNeal, and Isabella Cox. Petitioner's Exhibits 1 through 10,

12, and 14 through 18 were admitted into evidence. Intervenor's Exhibit 1 was also admitted into evidence. The Transcript was filed with DOAH on January 25, 2011. The parties were granted until February 4, 2011, to file proposed recommended orders. All parties timely filed Proposed Recommended Orders that have been considered in the preparation of this Order.

FINDINGS OF FACT

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

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

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

4. On November 23, 2009, Respondent issued the RFP to select a provider to operate IDDS programs in multiple counties, multiple circuits, within Florida. Petitioner did not protest the specifications of the RFP within 72 hours of the issuance of the RFP.

5. Petitioner and White submitted timely responses to the RFP. Both sought the award for Circuit 15.

6. On or about March 5, 2010, the Department posted its NOAA and informed all parties of its intent to award the contract at issue to Intervenor. The NOAA ranked White, first,

with 1549.78 points; JSP, second, with 1451.34 points; and Urban League of Palm Beach, Inc., third, with 862.58 points.

7. Petitioner filed a formal protest of the intended award to White on March 15, 2010. Thereafter, representatives from Petitioner and Respondent met to attempt resolution of the protest, but were unsuccessful. As the case moved forward to trial, White petitioned to intervene as the first ranked proposer. It is uncontested that White and JSP have standing in this matter.

8. Throughout these proceedings, Petitioner maintained that Respondent scored the proposals contrary to the specifications of the RFP. Additionally, Petitioner claimed that the persons appointed to evaluate the proposals for the award did not have the requisite experience and knowledge in the program areas, and service requirements sufficient to score the proposals.

9. Under the RFP, three components were to be scored by the evaluators: a technical section; a financial section; and a past performance section. A team of three evaluators independently scored the proposals submitted.

10. Department program area managers selected the evaluators, who were then approved by the Department's Deputy Secretary. All evaluators were trained in the evaluation process.

11. In order to assure that appropriate employees are selected to serve as evaluators, Amy Johnson, Respondent's chief of contracts, created a spreadsheet to identify those employees who are qualified to evaluate different types of procurements. The spreadsheet notes which program service area each employee is approved to serve. All of the evaluators in this case were chosen and deemed credentialed by Respondent to evaluate the subject RFP.

12. In this case Karen McNeal, Jeffrey Balliet, and Cheryl Surls were selected and approved to evaluate the responses to the RFP.

13. Ms. Johnson insured that the evaluators were trained to perform their duties. In this regard, Ms. Johnson reviewed the rules of the evaluation process and a generic evaluation with each of the evaluators. Training for the evaluators included how to score, along with sample scoring sheets. Although Ms. McNeal had not served as an evaluator prior to this case, she was appropriately trained and instructed in the methodology and guidelines for scoring proposals. Further, her job training and experience assured that she was familiar with IDDS program services. Mr. Balliet has served as an evaluator for proposals for approximately ten years. Mr. Balliet was appropriately trained and instructed in the scoring process. Additionally, Mr. Balliet's work experience also qualified him

to evaluate the IDDS proposals encompassed within the RFP responses. Finally, Ms. Surls has been familiar with the programs and services of IDDS for several years. She also completed RFP evaluation training prior to being placed on the spreadsheet list of potential evaluators.

14. On January 11, 2010, Elaine Atwood, the procurement officer for the instant RFP, conducted a conference call with the evaluators for this case. All of the evaluators were familiar with the IDDS program and were provided an opportunity to ask Paul Hatcher, the author of the scope of services for this RFP, any program question regarding IDDS and/or the RFP.

15. The Evaluation Team Ground Rules and Instruction specified that the evaluators were to read, evaluate, and score the proposals based upon the scoring sheet matrix. The evaluators were directed not to speak to other evaluators, nor to consider any information from any source other than the information provided within the proposal itself. If any evaluators were to require assistance, he or she was instructed to contact Ms. Atwood. All scoring was to be done based upon the solicitation document and the proposal submitted.

16. The matrix for scoring assigned a score from 0 to 5 depending upon how well the proposal addressed the specification requirement. A score of 5 constituted the highest rating, and only those proposals that exceeded all technical specifications

and requirements for the service component specified, with innovative, comprehensive, and complete detail were to receive that score. A score of 0 would be assigned when the proposal did not address the service component specified, or the evaluator could not locate the information in the proposal necessary to use another rating number.

17. Petitioner maintained that one evaluator, Ms. McNeal, failed to follow the directions related to changes to scoring. It is concluded that Ms. McNeal adequately marked the score sheet, such that there was no confusion as to the score awarded, or the time of its entry. Contemporaneous with an initial score of "5" for the category "Management Capability," Ms. McNeal re-marked the JSP score to a "4." Similarly, Ms. McNeal re-marked the JSP score for the category "Consideration 1" from "5" to "4." Any "change" occurred in the matter of moments that it took for Ms. McNeal to re-mark the score sheet, and did not indicate a reflection or after-thought of "change." If anything, the "change" was to correct an error of marking. Ms. McNeal's testimony as to the marking of the score sheet and her rationale for re-marking it has been deemed credible. Any deviation from the instructions as to a requirement that "change" must be documented is deemed minor or insignificant. Documenting a "change" is deemed minor and insignificant in this case, because the notation for the score of "4" was

contemporaneous with the initial mark and not a later after-thought.

18. Petitioner also challenged Ms. Surls' award of the score "3" to all of JSP's categories. Petitioner maintained that such an award demonstrated a lack of understanding regarding the subject matter addressed. To the contrary, Ms. Surls also awarded the score of "3" to White. The only category that exceeded "3" on Ms. Surls scoring of White was "Behavioral Management," for which Intervenor received a "4." Ms. Surls was consistent and thorough in her review of the proposals and commented appropriately as to the basis for each score.

19. The Technical Proposal narrative submitted by White did not exceed sixty pages.

20. Petitioner did not contest scoring where an evaluator increased JSP's score without comment.

21. None of the alleged "changes" to scoring gave any proposal an unfair advantage. All proposals were given the same consideration and thoughtful review.

22. The Department has used RFPs to cover multiple circuits in numerous instances. Petitioner did not timely challenge the process of providing for proposals for multiple circuits. Moreover, no evidence supports a finding that the

process of covering multiple circuits within one RFP is inherently flawed or contrary to law.

CONCLUSIONS OF LAW

23. 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. (2009). Unless otherwise noted all statutory references are to 2009 statutes in effect at the time of the bid.

24. 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.

25. 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 "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.)

26. 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:

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.

27. 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 Env'tl. Reg., 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) has 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. Dep't of Env'tl. 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, 635 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.”

28. JSP has the burden to establish the allegations in the Amended Petition by a preponderance of the evidence. Dep't of Transp. v. Groves-Watkins, 530 So. 2d 912, 913-914 (Fla. 1988).

29. Section 120.57(3)(b), 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.

30. In this case, it is concluded that Petitioner failed to timely challenge the terms of the RFP and thereby waived any claim that sought to challenge the specifications of the RFP. The methodology of submitting for multiple circuits or the scoring matrix used by Respondent are found to be consistent with past agency action. Moreover, the use of a spreadsheet from which to select eligible evaluators does not favor any party over another or demonstrate any inherent bias in the scoring system.

31. It is concluded that the Department's intended award of this contract to White is based upon the information that was available to the agency at the time the proposals were evaluated; that none of the evaluators intentionally (or otherwise) incorrectly scored the proposals; that the scoring was clear and unambiguous; that no party was inappropriately favored over another; that the process in this case supported competitive bidding; and that the Department's decision in this cause is supported by facts and logic. In short, Petitioner has failed to meet its burden in this case.

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 Juvenile Service Program.

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



J. D. PARRISH
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Filed with the Clerk of the
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this 14th day of March, 2011.

COPIES FURNISHED:

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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.