

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUMANA DENTAL INSURANCE)
COMPANY/COMP BENEFITS COMPANY,)
)
Petitioner,)
)
vs.) Case No. 10-9846BID
)
LEE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 15, 2010, in Fort Myers, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert A. Shimberg, Esquire
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For Respondent: Heather W. Hawkins, Esquire
Lee County School Board
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's intended decision to reject all proposals submitted in response to

Request for Proposal No. R106885GM-Group Dental Insurance (the RFP) is illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

On September 24, 2010, Respondent, Lee County School Board (School Board), issued a Notice of Intention to Reject All Proposals, rescinding a Notice of Intent to Award issued September 10, 2010, and rejecting all proposals submitted in response to the RFP. Petitioner, Humana Dental Insurance Company/Comp Benefits Company (Humana), filed a Petition for Formal Administrative Hearing, protesting the rejection of all proposals. The protest was forwarded to the Division of Administrative Hearings on October 22, 2010, for assignment to an Administrative Law Judge to conduct the final hearing.

On November 12, 2010, Humana filed Petitioner's Motion to Amend Its Petition for Formal Administrative Hearing in order to request that its bid dispute deposit be returned and that it be awarded attorney's fees and costs. The motion to amend was granted at the final hearing, and the Amended Petition for Formal Administrative Hearing was deemed filed as of November 15, 2010.

At the final hearing, Humana called the following witnesses: Dr. Gregory Adkins, Susan Strong, and Barbara Crowe. Petitioner's Exhibits 1 through 6, 8 through 15, 17, 19, and 20 were admitted in evidence. The School Board presented the

testimony of Dr. Gregory Adkins. Respondent's Exhibits 1, 2, and 4 through 8 were admitted in evidence.

No transcript of the final hearing was ordered. The parties agreed to file their proposed recommended order on or before November 29, 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 Lee County School District (District) currently offers two dental plans through Delta Dental, a DPO (Indemnity) and a DHMO plan to its approximately 10,000 eligible employees. Delta Dental has held the group insurance contract for approximately 12 years.

2. The District had required its dental plan provider, if an insurance carrier, to have an AM Best rating of A- or higher. Delta Dental had had an AM Best rating of A-, but its rating had slipped to a B++. Delta Dental notified the District of the change in its AM Best rating.

3. Upon learning of the change in the rating, the District decided to issue a request for proposals for its group dental plans. Susan Strong (Ms. Strong), who has been the director of insurance for the District for 15 years, chaired the insurance task force (ITF), which was responsible for the procurement of group insurance. Ms. Strong was also a member of the

subcommittee of the insurance task force, which was responsible for drafting, issuing, and evaluating the proposals and making a recommendation to the ITF.

4. The RFP required that the proposers who were insurance carriers have an AM Best rating of A- or higher. On June 3, 2010, the RFP was issued by the District.

5. Dr. James W. Browder (Dr. Browder), who was at that time the superintendent of schools for Lee County, approached Ms. Strong requesting that she convene the ITF to consider lowering the AM Best rating so that Delta Dental could qualify to submit a proposal. The ITF was convened and voted to lower the AM Best rating to B++. An addendum to the RFP was issued on June 25, 2010, lowering the AM Best rating to B++ and changing the date for submittal of proposals to July 8, 2010.

6. Pertinent provisions of the RFP provide:

2.1 Objective:

The objective of this Request for Proposal (RFP) is to provide a comprehensive Group Dental Insurance, with benefits equal to or superior to those of the current dental insurance plan, to the employees of the School District of Lee County, Florida (hereafter referred to as "SDLC"). SDLC is soliciting Proposals for DHMO and DPO/Indemnity group dental benefits. The vendors are requested to quote DHMO, DPO/Indemnity options, or both. If you cannot provide all of the plan options requested, you may propose one or more of the options. The successful vendor should also offer its product(s) at competitive prices, similar to the current dental

insurance plan, and guarantee rates for a minimum of two (2) years to ensure price stability for plan members.

2.2 Background:

* * *

In order to properly evaluate the financial impact of these plans, this RFP requests data necessary to properly evaluate the plan proposed. Proposers who do not provide the requested information may be negatively impacted during the scoring process.

* * *

2.10 One manually signed original (clearly marked as such), **ONE (1)** electronic version in Word 6.0 or higher on CD or diskette and **SIX (6)** Photocopies of the proposal must be sealed in one package and clearly labeled "**REQUEST FOR PROPOSAL FOR GROUP DENTAL INSURANCE**" on the outside of the package. The legal name, address, proposal's contact person, and telephone number must also be clearly annotated on the outside of the package. (Emphasis in original)

* * *

4.2 Minimum Eligibility In order to be considered for award and to be further evaluated, proposer must meet or exceed the following criteria. The proposer is responsible for providing the following information in their responses. The proposer should also include a statement of acknowledgement for the item below.

4.2.1 Proposer shall be appropriately licensed in the State of Florida to provide dental insurance.

* * *

5.1 The Insurance Task Force Sub-Committee (hereinafter referred to as "Committee"), SDLC, or both reserve the right to ask questions of a clarifying nature once proposals have been opened, interview any or all proposers that respond to the RFP, or make their recommendations based solely on the information contained in the proposals submitted. The Committee shall evaluate all proposals received, which meet or exceed Section 4.2, Minimum Eligibility Requirements. The Committee reserves the right to ask questions of a clarifying nature and interview any or all proposers that meet or exceed Section 4.2. . . .

5.2 The Evaluation Committee reserves the right to interview any or all proposer(s) and to require a formal presentation and clarification questions with the key people who will administer and be assigned to work on the contract before recommendation of award. The interview is to be based upon the written proposal received.

5.3 The Superintendent will recommend to the School Board, the award or rejection of any or all proposal(s).

5.4 The School Board may award or reject any or all proposals.

* * *

5.7 The District will make an award to the company whose proposal is most advantageous to the District with respect to benefits/services, costs and other factors.

5.8 All proposals should be submitted initially with the most favorable terms. If additional information or clarification is required, the proposer shall be prepared to submit such information in a timely manner.

5.9 Award of benefits/services contracts is subject to negotiation, and the District may

undertake simultaneous negotiations with those companies who have submitted proposals.

5.10 The District reserves the right to waive formalities, technicalities, or irregularities in any proposal, to reject any or all proposals in whole or in part, with or without cause, to re-advertise, or to accept the proposal which, in its judgment, will be in its best interest.

6.1.1 The District reserves the right to accept or reject any or all proposals.

6.1.2 The District reserves the right to waive any irregularities and technicalities and may, at its sole discretion, request a clarification or other information to evaluate any or all proposals.

6.1.3 The District reserves the right, before awarding the contract, to require proposer(s) to submit evidence of qualifications, contact references or any other information the District may deem necessary.

* * *

6.1.5 The District reserves the right to: (1) accept the proposals of any or all of the items it deems, at its sole discretion, to be in the best interest of the District; and (2) the District reserves the right to reject any or all items proposed or award to multiple proposer(s).

* * *

6.3.1 Bidders are hereby advised that they are **not** to lobby with any District Personnel or Board Members related to or involved with this bid. All inquiries must be written and directed to the Department of Procurement Services. (Emphasis in original)

Lobbying is defined as any action taken by an individual, firm, association, joint venture, partnership, syndicate, corporation, and all other groups who seek to influence the governmental decision of a Board Member or District Personnel on the award of this contract.

Any bidder or any individuals that lobby on behalf of a bidder will result in rejection/disqualification of said bid.

6.4.1 In order to maintain comparability and enhance the review process, it is required that proposals be organized in the manner specified in Section 4.1. Include all information in your proposal. **It is required that SIX (6) copies of the proposal be submitted with the original proposal** (clearly marked as such) and **ONE (1)** electronic version in Word 6.0 or higher on CD or diskette. (Emphasis in original)

7. The proposals in response to the RFP were submitted on July 8, 2010. Among the proposers who submitted proposals were Ameritas Life Insurance (Ameritas); CIGNA Dental & Connecticut Life Insurance Company (CIGNA); Delta Dental, Humana, United Concordia Dental Care; Metlife; and the Standard.

8. On July 8, 2010, after the proposals had been opened, an e-mail was sent by the District to Ameritas, requesting that Ameritas provide the electronic version of the proposal as required by Sections 2.10 and 6.4.1 of the RFP. On July 9, 2010, the District sent an e-mail to the Standard, requesting that it supply an electronic version of its proposal in a

CD format. The Standard had supplied a PDF format, which was not acceptable.

9. On July 20, 2010, an e-mail was sent by the District to several proposers, requesting that a copy of their licenses to provide dental insurance in Florida be sent. The e-mail stated that the submittal of the license was required pursuant to Section 4.2.1 of the RFP. However, Section 4.2.1 does not require that a copy of the license be submitted; it requires only that the proposer be licensed. No evidence was presented that details how these proposers addressed the issue of licensure in their proposals. Section 6.1.3 of the RFP does allow the District to require the proposer to submit evidence of qualification prior to the award of the contract.

10. On July 26, 2010, e-mails were sent by the District to Ameritas and United Concordia Dental Care, stating:

On the DPO/Indemnity Plan Questionnaire, Question 11 asked the following: "In the chart below, provide information regarding DPO/Indemnity contracted rates and employee cost sharing for SDLC." There were two columns for your company to complete--"DPO Allowable" and "Indemnity Allowable." You did not provide amounts for the "DPO Allowable" column. This information is critical to our evaluation process.

Could you please supply the DPO Allowable rates as soon as possible, but no later than 2:00 PM, Wednesday, July 28th?

11. United Concordia Dental Care submitted the omitted DPO Allowable rates on July 27, 2010. Ameritas submitted the omitted information on July 28, 2010.

12. The evaluation committee reviewed and scored the proposals. Based on their evaluation, Humana, Delta Dental, and CIGNA were determined to be the top three proposers to be shortlisted.

13. On August 4, 2010, the District sent an e-mail to Humana, Delta Dental, and CIGNA, requesting that they respond to a number of clarification questions. Additionally, the School Board stated:

SDLC would be interested in offering a low option DPO in lieu of a DHMO product with premiums similar to its current DHMO. What type of a DPO plan could you design with monthly premiums of \$20-22 Employee, \$30-35 Employee/Spouse, \$30-35 Employee/Child; \$50-60 Employee/Family.

Provider [sic] details for each level of coverage in the table below.

Deductable per Individual/Family	
Annual Maximum Benefit	
Diagnostic/Preventive Benefit	
Basic Benefit/Level II	
Major Benefit/Level III	
Orthodontic Benefit/Level IV	
Other Benefits	

14. None of the other proposers were asked to propose a separate low-option DPO plan. Section 2.1 of the RFP provided that proposers could submit a DHMO option or a DPO/Indemnity

option or both options. Although some of the proposers did submit Low-Option DPO/Indemnity plans, none of the top three proposers submitted such options. CIGNA, Delta Dental, and Humana submitted a Low-Option/Indemnity plan in response to the District's e-mail of August 4, 2010.

15. The District interviewed each of the top three proposers.

16. On August 27, 2010, Ginny Monroe, the procurement agent for the District, sent an e-mail to Humana, which stated:

Congratulations, as the top ranked proposer the SDLC wishes to enter into negotiations. Attached please find a scanned negotiation letter. Please sign and return this letter via fax or email no later than Monday, August 30, 2010 at 2:00 pm.

17. On August 30, 2010, Dr. Gregory Adkins (Dr. Adkins), who is the chief human resources officer for the District, asked Ms. Strong to provide several bullet points highlighting the reasons Humana was selected as the dental provider. On September 7, 2010, Dr. Browder requested Ms. Strong to prepare a summary of the reasons the evaluation committee had chosen Humana. Ms. Strong prepared the summary and had it delivered to Dr. Browder on September 8, 2010.

18. On September 9, 2010, Dr. Adkins requested Ms. Strong to prepare a side-by-side comparison of the top three proposers.

She did as requested and took the comparison analysis to Dr. Adkins, who discussed them with Dr. Browder.

19. On September 9, 2010, Delta Dental sent a letter to Dr. Browder, stating that Delta Dental had received the dental carrier finalist information. Delta Dental proceeded to address each of the issues set forth in the comparison prepared by Ms. Strong. The letter by Delta Dental was in violation of the RFP prohibitions concerning lobbying.

20. On September 10, 2010, the Lee County School District posted an intended award to Humana, stating: "Based on the review of the individual scoring sheets by the evaluation committee, the Superintendent will recommend to The School Board of Lee County that Humana Dental Insurance Company/Comp Benefits Company be accepted as the awarded vendor having submitted the overall best responsive proposal and that purchase order(s) be forwarded to same."

21. On September 10, 2010, Dr. Adkins sent an e-mail to Ms. Strong, questioning whether Humana's premiums were truly lower than Delta's. Ms. Strong told Dr. Adkins that she would prepare a premium analysis. She forwarded the premium analysis to Dr. Adkins on September 13, 2010.

22. On September 13, 2010, Dr. Adkins met with Dr. Browder and others concerning the intended award. Dr. Browder wanted to reject all bids based on concerns by School Board members about

the premiums and lack of clarity of the benefits offered and instructed Greta Campbell (Ms. Campbell), an employee in the procurement department, to post a rejection of all bids. Dr. Adkins asked Dr. Browder to wait on the rejection of all bids until Dr. Adkins had time to discuss the matter with Ms. Strong. At that time, the only explanation that Dr. Adkins gave Ms. Strong was that some School Board members were concerned about the premiums and benefits.

23. Dr. Browder requested the legal staff for the District to review the procurement process before a rejection of all bids was posted. Heather Hawkins (Ms. Hawkins) reviewed the procurement and found that there were some procedural errors that had occurred.

24. On September 23, 2010, Dr. Browder, Dr. Adkins, Ms. Hawkins, Ms. Campbell, Keith Martin, and Dr. Lawrence D. Tihen, who was to become the interim superintendent after Dr. Browder's departure, met to discuss Ms. Hawkins' findings. The procedural errors discussed concerned the District allowing proposers to supply missing information after their proposals had been submitted; the District making requests for clarifications; and the District requesting that the top three proposers submit low-option DPO plans.

25. On September 24, 2010, the District posted a Notice of Intent to Reject All Proposals, which stated:

Please be advised that the Notice of Intention to Award issued September 10 in the above-referenced matter is hereby rescinded. The Superintendent will recommend to the School Board of Lee County at its October 19th meeting that all proposals received in the above-referenced solicitation be rejected due to a procedural error.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat. (2010).¹

27. Subsection 120.57, Florida Statutes, sets forth the procedures to be followed in protesting contract awards by agencies. Subsection 120.57(3)(f), Florida Statutes, provides:

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent. (Emphasis supplied)

28. In the instant case, the agency decision is to reject all proposals; thus, the standard of review is whether the intended action is illegal, arbitrary, dishonest, or fraudulent.

29. The reason given for the rejection of all proposals was procedural error. Thus, the first issue is to determine whether there were procedural errors committed by the District.

30. The RFP provided that the District could ask proposers clarifying questions and request additional information. Although the RFP allowed clarifying information to be submitted after the proposals were opened, it cannot be read to allow proposers to submit information that was required by the RFP, but was omitted from the proposals. To do so would be in violation of Subsection 120.57(3)(f), Florida Statutes, which prohibits submissions after the proposals are opened which amend or supplement the proposals. The failure to submit a CD of the proposal may be considered a minor irregularity because the proposal itself is not changed.² However, allowing proposers to amend their proposals after the proposals are opened by

submitting omitted information that is needed in the evaluation of the proposals, such as DPO Allowable Amounts, is in violation of Subsection 120.57(3)(f), Florida Statutes.

31. Section 4.2.1 of the RFP requires that the proposers be appropriately licensed in the State of Florida to provide dental insurance. The provision does not require that a copy of the license to sell dental insurance be included in the proposal. Section 6.1.3 of the RFP allows the District to request proposers to submit evidence of their qualifications prior to the award of a contract. Requiring submittal of the insurance license would fall under the kind of request that would be allowed under Section 6.1.3. The submission of evidence of a license does not affect whether the proposer was licensed at the time of the submittal of the proposal. The proposer was either licensed or not licensed.

32. The District changed the terms of the RFP when it required the top three proposers to submit low-option DPO plans for evaluation. There is nothing in the RFP which provides for a selection of the three proposers with the highest score and then to further evaluate those proposers on plans that were developed and submitted after the proposals were opened. If the District had wanted to use that evaluation process, it could have stated so in the RFP. Additionally, if the District had

wanted a low-option DPO plan designed to specific criteria, it should have included that in the RFP.

33. Humana states in its Proposed Recommended Order that the District was negotiating simultaneously with the top three proposers. The District was not negotiating with the top three proposers simultaneously. If that were so, the District would not have issued the e-mail to Humana on August 27, 2010, that the District wished to enter into negotiations with Humana. The District was continuing the evaluation of proposals when it asked for a low-option DPO plan designed to the District's specifications.

34. Another procedural error was the failure to reject the proposal of Delta Dental for lobbying by sending the September 9, 2009, letter to Dr. Browder.

35. There were procedural errors as discussed above that were sufficient to cause the District to reject all bids. Humana argues that Dr. Browder's first call for rejection of all bids was not based on procedural errors, and such argument is not relevant. Dr. Browder called for a legal opinion on the legality of the procurement process that was used, and counsel for the District found that there were errors. The procedural errors and not the concern of School Board members was the final cause for the rejection of all bids.

36. The intended decision to reject all bids was not illegal, dishonest, or fraudulent. To have awarded the contract to Humana with the irregularities in the procurement process would have been in violation of Subsection 120.57(3)(f), Florida Statutes, and the RFP specifications.

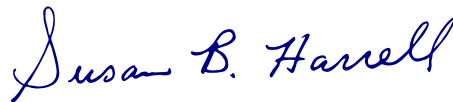
37. The intended decision was not arbitrary. An arbitrary decision is one that is not supported by facts or logic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). The determination of whether an agency has acted arbitrarily is based on "whether 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, Inc. v. Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The District did consider all relevant factors and requested a legal opinion on the propriety of the procurement. The District discussed the procedural errors that Ms. Hawkins' review revealed and concluded that irregularities had occurred. Because of the procedural errors the District decided to reject all proposals.

38. Humana has failed to establish that the rejection of all proposals was fraudulent, illegal, dishonest, or arbitrary.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the rejection of all proposals was not fraudulent, illegal, dishonest, or arbitrary and dismissing Humana's protest.

DONE AND ENTERED this 2nd day of December, 2010, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of December, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2010 codification.

^{2/} Sections 5.10 and 6.1.2 of the RFP allow the District to waive irregularities and technicalities. "The purpose of competitive bidding is to secure the lowest responsible offer and . . . the [agency] may waive minor irregularities in effectuating that purpose." Robinson Electrical Co., Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3rd DCA 1982). A minor irregularity does not give "the bidder a substantial advantage over the other bidders, and thereby restrict[] or stifle[] competition." Id.

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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.