

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CATAPULT LEARNING, LLC,

Petitioner,

vs.

Case No. 14-1641BID

ORANGE COUNTY SCHOOL BOARD,

Respondent,

and

OMBUDSMAN EDUCATIONAL SERVICES,
LTD,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case via video teleconferencing between Orlando and Tallahassee Florida, before Lynne A. Quimby-Pennock, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Intervenor: Charles Thomas Huddleston, Esquire
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STATEMENT OF THE ISSUE

The issue in this case, a bid protest, is whether Respondent, Orange County School Board (the School Board), acted contrary to its governing statutes, rules or policies when it awarded the alternative education drop-out prevention services request for proposal number 1401017 (the RFP) to Ombudsman Educational Services, LTD. (Ombudsman) instead of Catapult Learning, LLC (Catapult).

PRELIMINARY STATEMENT

On January 31, 2014, the School Board issued the RFP seeking written proposals for a "comprehensive alternative education program for students in grades nine through twelve who need to earn and/or recoup credits due to risk factors such as: truancy and nonattendance, academic failure in core and elective subject areas, behavioral problems, circumstances that have led to suspension or expulsion from school, and other social, personal, health, or economic conditions which have impeded their progress." On March 13, the School Board's proposal evaluation

committee (PEC) met and heard the presentations from the three short-listed bidders. On March 17, the School Board posted the PEC's presentation ranking and presentation evaluation form.

On March 28, 2014, Catapult filed its Petition. Catapult's Petition and notice of protest (submitted March 19) were filed at DOAH on April 11. Following a case status conference call, the hearing was scheduled for May 9, via video teleconference in Orlando and Tallahassee, Florida.

On April 18, 2014, Ombudsman filed a Petition to Intervene in the DOAH proceeding. Ombudsman's petition was granted by Order dated April 22. On April 24, Marquette Bryan, Esquire, and Charles Huddleston, Esquire, each filed a notice of appearance for Ombudsman.

Catapult filed an Amended Petition with exhibits on April 18, 2014, and the School Board filed a Motion to Dismiss Amended Petition or Alternatively, Motion to Strike Requested Relief on April 23. On May 1, an Order was issued that denied the School Board's motion to dismiss but set forth the parameters of the relief that the undersigned would utilize, i.e., "the undersigned 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. Further . . . the standard of proof

shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious."

Following Catapult's unopposed motion for a new hearing date, the hearing was re-scheduled and heard on May 14, 2014. As required by the Order of Pre-hearing Instructions, the parties filed a Joint Pre-hearing Stipulation on May 12.

At the final hearing, Catapult called Myrnellie Nido,^{1/} the School Board's director of purchasing and contracting; Nicolas Bates, Catapult's chief financial officer; and Shannon Folsom, Catapult's regional director, as its witnesses. In addition to Ms. Nido, the School Board called Dolly Morales, a School Board business opportunity specialist, and Chris Bernier, an associate superintendent of the School Board, as witnesses. Ombudsman called Allison O'Neill, the chief operating officer for Educational Services of America, the parent organization for Ombudsman.^{2/} The parties stipulated to the introduction of Exhibits A through MM, which were received into evidence at the beginning of the hearing. A transcript of the final hearing was ordered by the parties.

The Transcript was filed at DOAH on May 21, 2014. By rule, the parties were allowed ten days from the submission of the Transcript to submit proposed recommended orders. The School Board and Ombudsman, jointly, and Catapult each timely submitted

a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.^{3/}

FINDINGS OF FACT

1. Catapult is a limited liability company organized in Delaware. Catapult currently holds the contract in Orange County for the Alternative Education Drop-out Prevention program.

2. The School Board is a public entity responsible for procuring services for the Orange County public school system.

3. Ombudsman is a for-profit corporation duly organized in Illinois.

4. On or about January 31, 2014, the School Board issued the RFP, "requesting solicitations from experienced respondents with a proven track record in providing alternative education services to students at risk of dropping out or [who] have dropped out from school and seek to return to continue their education." Originally, the solicitations were to be filed "no later than 2:00 p.m. EST, on February 24, 2014."

5. The RFP included the following admonition and time schedule:

The District will attempt to use the time schedule as indicated below. Note: References to Ronald Blocker Education Leadership Center (RB-ELC) address is: 445 West Amelia Street, Orlando, FL 32801. The below dates and times are subject to change. All changes will be posted to the Procurement website as they become available.

January 31, 2014	Solicitation Date
February 10, 2014	Re-submittal conference at 1:00 p.m. RB-ELC,
February 11, 2014	Request for Information (RFI) cut-off
February 24, 2014	Proposal opening at 2:00 p.m., RB-ELC, Lobby Conference Room Proposal will be opened and only the company names will be announced
March 6, 2014	Evaluation Meeting Date (Tentative Date) (8:30 a.m.)
March 7, 2014	Notice of Intended Decision (Tentative Date) (8:00 a.m.)
March 13, 2014	Presentations by Respondents (Tentative Date)
March 14, 2014	Notice of Intended Decision Date (Tentative Date)
April 8, 2014	Board Recommendation (Tentative Date)

6. On February 19, the School Board issued Addendum No. 1 (the Addendum) which provided the new solicitation deadline, highlighted in red ink, of "11:00 A.M., EST on February 26, 2014." Additionally, the Addendum advised the potential bidders (or vendors) of "changes/clarifications" to the RFP: "REVISED PROPOSAL PRICE SHEET, APPENDIX A" with the sentence, "Please ensure you submit your proposal using this REVISED PROPOSAL PRICE

SHEET," and a paragraph addition to the "Scope of Services." These announced changes were also highlighted in red ink.

7. The evaluation criteria for the RFP were provided in section 5, "Evaluation of Proposals." Potential bidders were advised that the PEC would receive, publicly open, review, and evaluate the proposals. Additionally, the PEC reserved the right to "interview any, all or none of the Respondents . . . and to require formal presentations with the key personnel . . . before recommendation of award." Section 5.5, "EVALUATION CRITERIA," provided:

Only proposals that meet the compliance requirements will be evaluated based on the following criteria.

<u>Shortlist</u> <u>Evaluation Criteria</u>	Possible Points	Maximum Weight Value
I. Experience and Qualifications	100	30%
II. Scope of Services	100	40%
III. MWBE/LDB ^{4/} Participation	100	10%
IV. Proposal Price	<u>100</u>	<u>20%</u>
	400	100%

The Procurement Representative shall calculate all scoring and determine a ranking of all respondents. The PEC shall determine if presentations/interviews are necessary.

Note: The District will post an intended decision recommending Respondents to move to the next phase to be review [sic] by interested parties on the SBOC website at www.procurement.ocps.net. Failure to file a protest within the time prescribed in Section 120.57(3)b, Florida Statutes, shall constitute a waiver of proceedings under Chapter 120, Florida Statutes. Once the

allowed time period has passed this phase of the process will be completed.

Presentations/Interviews: Should the PEC members request presentation or interview from shortlisted respondents the following evaluation criteria will apply:

<u>Presentation/Interview Evaluation Criteria</u>	<u>Possible Points</u>	<u>Maximum Weight Value</u>
I. Planning/Delivery of Service	100	40%
II. Firm Experience	100	20%
III. Evidence of Student Achievement	<u>100</u>	<u>40%</u>
	300	100%

The Procurement Services representative shall calculate all scoring and determine a ranking of the shortlisted firms based on the presentation/interview evaluation criteria. The highest ranked firms will be recommended for negotiation and award.

8. Timely responses to the RFP were submitted by six vendors: Catapult, Ombudsman, Atlantic Education Partners, Advanced Path, Excel Alternative Schools, and Driven Academy. These responses were reviewed by the PEC which was composed of School Board personnel with various educational based backgrounds.

9. On March 6, the PEC evaluated all six proposals according to the RFP stated evaluation criteria: experience and qualifications; scope of services; proposal price; and MWBE/LDB. Four of the six bidders did not provide the pricing proposal as a percentage of full time equivalent.

10. All six vendors were awarded zero points for the proposal price, and each received zero value for the proposal price. The justification for each bidder receiving a zero score was based on the School Board's procurement representative's inability to provide an "apples to apples" comparison of the six pricing proposals. Ms. Nido, the School Board's procurement representative, affirmed the School Board's position that when a proposal is non-responsive it is not scored. Here, all six proposals were scored.

11. The PEC evaluated and ranked all six vendors. The PEC then posted its short list evaluation rankings, which included the short list evaluation form. Both Catapult and Ombudsman scored the same ranking: 64.2. Below the ranking, the following sentence appeared: "Committee agreed by consensus to invite Catapult Learning, Ombudsman, and Atlantic Education Partners for interviews/presentations." Additionally, below this sentence the following language appeared:

"Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."
The 72 hour posting requirement will elapse on March 11, 2014 at 2:30 p.m. E.S.T.
"The Orange County Public School Board is an equal opportunity agency."

12. Catapult did not have a representative present during the March 6 meeting as Ms. Folsom, the local director, arrived late. It is the School Board's practice that if a member of the public appears late for an evaluation meeting, the staff will bring the public to the meeting room, knock on the meeting door and allow the public into the meeting. If the meeting is over, the public is not brought to the meeting room.

13. No vendor filed a written notice of protest within 72 hours after the School Board posted the short list evaluation ranking.

14. On March 6, the School Board posted a meeting notice that the PEC would meet on March 13 at 8:30 a.m. EST to hear the three bidders' presentations. Atlantic Educational was to make its presentation first, followed by Catapult and lastly, Ombudsman. The meeting notice also provided that the PEC would evaluate the three bidders' presentations immediately following the conclusion of the presentations. Later on March 6, Catapult made a public records request for all proposals submitted pursuant to the RFP. Catapult asked that the documents be sent via email or Catapult would have a staff member come to the "proper office" at the School Board. Catapult received the requested public records at its New Jersey office sometime after March 12, 2014.

15. As scheduled, on March 13, the PEC met and heard the presentations of Atlantic Educational, Catapult, and Ombudsman, the three short list bidders. As set forth in the RFP, section 5.5., the criteria for the presentation evaluation included the following criteria: planning/delivery of service; firm experience; and evidence of student achievement.

16. Four days later, the School Board posted the presentation ranking and presentation evaluation form. Out of a possible 100 points in each category, Catapult received 81 points for planning/delivery of service, 86 points for firm experience, and 83 points for evidence of student achievement, for a total of 250 points. Ombudsman received 88 points for planning/delivery of service, 87 points for firm experience, and 83 points for evidence of student achievement, for a total of 258 points.

Below the presentation ranking, the following sentence appeared:

"Committee agreed by consensus to enter into negotiation and contract award to the following vendor(s): Ombudsman."

Additionally, below this sentence the following language appeared:

"Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."
The 72 hour posting requirement will elapse on March 20, 2014 at 9:00 a.m. E.S.T.

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17. On March 19, Catapult filed its notice of protest and posted the requisite bond. On March 28, Catapult filed its formal written protest, the Petition, and thereafter on April 18, filed an Amended Petition.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2013).^{5/}

19. Section 120.57(3)(f) provides that, in a protest to a proposed contract award pursuant to a request for proposal procurement (RFP):

[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.

20. The court in Colbert v. Department 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).

21. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement, as described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931), as follows:

The object and purpose . . . 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 . . ., by affording an opportunity for an exact comparison of bids.

22. A capricious action has been defined as an action "which is taken without thought or reason or irrationally." Agrico Chem. 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) 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 Enter. 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. Department of Transportation, 602 So. 2d 632, 632 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."

23. Catapult has the burden to establish the allegations in the protest by a preponderance of the evidence. Dep't of Transp. v. Groves-Watkins, 530 So. 2d 912, 913-914 (Fla. 1988). Catapult has alleged that the School Board's failure to consider price in the initial evaluation invalidated the PEC's evaluation. Such is not the case. The PEC considered price, but determined to award zero points to all the vendors, thus no perspective bidder was put at an advantage or disadvantage over the others. Each proposal was given a complete and honest evaluation.

24. According to the RFP, the PEC evaluated the top three short list vendors using the same evaluation criteria. It was neither arbitrary nor capricious, but rather through the evaluation criteria that Ombudsman was chosen by the PEC.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the presentation ranking that found Ombudsman to be the highest ranking bidder was not contrary to the School Board's governing statutes or the School Board's policies or rules, nor was it clearly erroneous, arbitrary, capricious or contrary to competition.

DONE AND ENTERED this 5th day of June, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of June, 2014.

ENDNOTES

^{1/} Catapult and the School Board each listed Ms. Nido as a witness. Although Catapult excused Ms. Nido following her direct testimony, the School Board recalled her in its case in chief.

^{2/} Ombudsman and Catapult each listed Ms. O'Neill as a witness. Ms. O'Neill was called out of order to facilitate an efficient use of hearing time.

^{3/} Respondent and Intervenor inserted an endnote No.2 in their Proposed Recommended Order, providing additional information that was not provided during the hearing, and thus not subject to cross-examination. This information is being treated as late-filed testimony and has not been considered in the preparation of this Recommended Order. See § 120.57(1)(b), Fla. Stat.

^{4/} MWBE/LDB means: minorities or women-owned business enterprises/local developing businesses.

^{5/} All statutory references are to Florida Statutes (2013), unless otherwise indicated.

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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.