

**STATE OF FLORIDA  
DEPARTMENT OF MANAGEMENT SERVICES**

**HUMANA, INC.,**

**Petitioner,**

Final Order No. DMS – 14-0054

**v.**

**DOAH CASE NO.: 14-2915BID  
DMS CASE NO.: 14-29418**

**DEPARTMENT OF MANAGEMENT  
SERVICES, DIVISION OF STATE  
GROUP INSURANCE,**

**Respondent,**

**and**

**SUPERIOR VISION SERVICES, INC.**

**Intervenor.**

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**FINAL ORDER**

On June 12, 2014, Petitioner, Humana, Inc. (Humana), timely filed with the Department of Management Services (Department) its Formal Written Protest and Petition for Administrative Hearing (petition) challenging the Department's intent to award a contract to Superior Vision Services, Inc. (Superior), based on the evaluation of proposals received in response to the Request for Proposals for Group Vision Benefits Insurance, RFP No. DMS 13/14-030-REBID (Request for Proposal). The petition also sought to award the contract to Humana as the lowest responsive and responsible bidder.

On June 20, 2014, the formal protest was referred to the Division of Administrative Hearings for further proceedings. Prior to final hearing scheduled for July 16 and 17, 2014, the parties moved for the entry of an order relinquishing jurisdiction back to the agency and closing the file with the Division of Administrative Hearings. The agreed upon basis for the Motion to Relinquish Jurisdiction was that the intended awardee, Superior, has not been licensed by the

Office of Insurance Regulation for the requisite three year period. This licensure period is a minimum requirement in the Request for Proposals and failure to meet this requirement causes the Department to find that the bid proposal submitted by Superior as non-responsive and therefore disqualified the bid proposal from further consideration. The parties also agreed that as a result of a flawed evaluation regarding the responsiveness of Superior's proposal, the Department's intended decision to award the contract to Superior was clearly erroneous and can no longer be maintained. As a result, the administrative law judge granted the Motion on July 16, 2014 and jurisdiction was relinquished back to the Department, pursuant to section 120.57(i), Florida Statutes, and rule 28-106.204(2), Florida Administrative Code. This matter is before the undersigned for the purpose of issuing a Final Order, in accordance with section 120.57(4), Florida Statutes.

#### **STIPULATED FINDINGS OF FACT**

1. Five vendors responded to the Request for Proposal including Humana, Superior, MetLife, United HealthCare, and Davis Vision. (Joint Pre-Hearing Stipulation)
2. MetLife was declared non-responsive for failure to provide requested rates for the optional renewal term and United HealthCare and Davis were both declared non-responsive for their failure to provide minimum Network Access. (Joint Pre-Hearing Stipulation)
3. Only responsive vendors were eligible to proceed to the scoring portion of the procurement. (Joint Pre-Hearing Stipulation)
4. The intended awardee, Superior, has not been licensed by the Office of Insurance Regulation for the requisite three year period. This licensure period is a minimum requirement in the request for proposals and failure to meet this requirement deems the bid proposal submitted by Superior non-responsive and disqualifies the bid proposal from further consideration. (Motion to Relinquish Jurisdiction)

5. As a result of a flawed evaluation regarding the responsiveness of Superior's proposal, the Department's intended decision to award the contract to Superior was clearly erroneous and can no longer be maintained. (Motion to Relinquish Jurisdiction)

6. Humana is a responsive and responsible vendor to the Request for Proposal at issue. (Joint Pre-Hearing Stipulation)

### **CONCLUSIONS OF LAW**

7. The Department of Management Services has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.57(1)(i) and 120.57(4), Florida Statutes.

8. Section 120.57(1)(i), Florida Statutes, states:

When, in any proceeding conducted pursuant to this subsection a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate . . . [emphasis added.]

9. Section 120.57(4), Florida Statutes, allows for an informal disposition of the case based upon the following:

INFORMAL DISPOSITION. – Unless precluded by law, informal Disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

10. Material disputes of fact in this case were resolved through stipulations in the Motion to Relinquish Jurisdiction and the Joint Pre-Hearing Stipulation, which allow for an informal disposition of the proceedings. Under the facts and circumstances, additional proceedings under section 120.57(2), Florida Statutes, are unnecessary and inappropriate because the need for a de novo proceeding no longer exists.

11. The burden of proof in this bid protest is upon Humana. Section 120.57 (3) (f), Florida Statutes, provides:

... 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, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious.

12. The clearly erroneous standard of proof set forth in section 120.57(3)(f), Florida Statutes, governs the determination that the Department's intended decision to award the contract to Superior was improper. Under the specifications set forth in the request for proposals, failure to meet the three year licensure requirement renders a proposal non-responsive and disqualifies the bid proposal from further consideration. The Department's initial review regarding the responsiveness of Superior's bid was incorrect, which was realized during the discovery process in the bid protest. Once this ultimate question of fact was established, further proceedings before an administrative law judge were unnecessary. As a matter of law, Humana was able to prove by the clearly erroneous standard that the Department's decision to select the proposal of Superior was inconsistent with the request for proposal.

13. The return of the case to the Department for a final order and a contract award to Humana after the error was established is consistent with *State Contracting and Engineering Corporation v. Department of Transportation*, 709 So. 2d 607 (Fla. 1<sup>st</sup> DCA 1998). In *State Contracting*, the court stated that the object of the de novo proceeding in an award case is to "evaluate the action taken by the agency". The evaluation was completed in this case, without the need for continued proceedings.

14. In its petition, Humana requested that the Division of Administrative Hearings enter a Recommended Order recommending that the Department award the contract to Humana. Because the case has been relinquished back to the Department, a contract award can be made as part of this final order because it was stipulated that Humana's bid was responsive and the proposals from the other four vendors were non-responsive. A final order can authorize an award when two or more bids have been received and at least one bid confirms in all material respects to the request for proposals. See *Satellite Television Engineering Inc., v. Department of General Services*, 522 So. 2d 440 (Fla. 1<sup>st</sup> DCA 1988); *Harris\3M v. Office Sys. Consultants*, 533 So.2d 833 (Fla. 1<sup>st</sup> DCA 1988).

15. All of the vendors, who responded to the request for proposals and were declared non-responsive, had clear points of entry to challenge the decision regarding their respective bids in an administrative hearing. Accordingly, due process requirements for all vendors have been met and further challenges to a contract award to Humana have been waived. They were provided a full and fair opportunity to contest the proposed agency action on any relevant ground before the proposed action of declaring them non-responsive became final. See *Gtech Corp. v. Department of Lottery*, 737 So.2d 615 (Fla. 1<sup>st</sup> DCA 1999), *rev. dismissed* 822 So.2d 1243 (Fla. 2002).

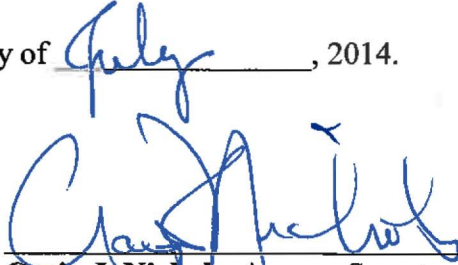
Based upon the foregoing Stipulated Findings of Fact and Conclusions of Law, it is ORDERED:

A. The Department will award to Humana, Inc., the proposed contract in accordance with and subject to the requirements of the Request for Proposal No. DMS 13/14-30-REBID for Group Vision Benefits Insurance, and the submissions from Humana, Inc., in response to the request for proposal.

B. The Department will return to Humana, Inc., the cashier's check in the amount of \$195,000.00 that accompanied the petition, as required by the request for proposal.

C. This Final Order shall become effective on the date of filing with the agency clerk of the Department of Management Services.

DONE and ORDERED on this 28th day of July, 2014.

  
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**Craig J. Nichols**, Agency Secretary  
Department of Management Services  
4050 Esplanade Way, Suite 285  
Tallahassee, Florida 32399

**NOTICE OF RIGHT TO APPEAL**

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original notice of appeal with the agency clerk of the department of management services, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate district court of appeal. The notice of appeal must be filed within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

Certificate of Clerk:  
Filed in the Office of the Agency  
Clerk of the Department of Management  
Services on this 29th day of  
July, 2014.

  
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Michael Sivilla, Agency Clerk

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