

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIDGES OF AMERICA, INC.,

Petitioner,

vs.

Case No. 14-4744BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

COMMUNITY EDUCATION CENTERS,
INC.,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on November 12, 2014, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether in deciding to award a contract for comprehensive re-entry services to be provided at the Everglades Re-Entry Center ("Everglades"), Respondent, Department of Corrections (the "Department" or "DOC"), acted contrary to one or more governing statutes, rules, policies, or procurement specifications, or any combination thereof; and if so, for each such instance, whether the misstep was clearly erroneous, arbitrary, capricious, or contrary to competition.

PRELIMINARY STATEMENT

This case commenced with the posting, on September 16, 2014, of the Department's intent to award the contract for Everglades to Intervenor, Community Education Centers, Inc. ("CEC"). Petitioner, Bridges of America, Inc. ("Bridges"), a vendor who was not approved, timely filed a formal bid protest to challenge the award. The bid protest contends that DOC acted contrary to law and to the specifications set forth in Invitation to Negotiate DC ITN 13-038 (the "ITN").

At the final hearing, Bridges presented the testimony of five witnesses: Kelly Wright, purchasing analyst for DOC; Patrick Mahoney, the Chief of Bureau of Transition and Substance

Abuse Services for DOC; James Freeman, warden at Baker Correctional Facility; and Dan Eberlein, region 2 re-entry coordinator for DOC. Bridges' Exhibit 2 was accepted into evidence. CEC called one witness: Lori Constantino-Brown. DOC's Exhibits 1 and 2 were admitted. Joint Exhibits 1 through 53 were also admitted into evidence. The parties stipulated that all testimony given in a companion case (DOAH Case No. 14-4743BID) could be relied upon in the instant matter. Official recognition of the transcript of testimony from that case is hereby made.

The parties advised that a transcript of the final hearing would be ordered. By rule the parties have ten days from the date the transcript is filed to file proposed recommended orders. The Transcript was filed on December 1, 2014. The parties each timely filed a Proposed Recommended Order. Each party's Proposed Recommended Order was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In 2014, the Florida Legislature authorized DOC to open two 432-bed substance abuse treatment, transition and vocational training centers ("Re-Entry Centers") by way of the 2014-2015 General Appropriations Act. The Department was also authorized, pursuant thereto, to issue a competitive solicitation for

comprehensive program services for the inmates at the Re-Entry Centers.

2. On June 10, 2014, the Department issued the ITN entitled, "Comprehensive Re-Entry Services at Everglades and Baker Re-Entry Centers." The stated purpose of the ITN was to select "qualified vendors to provide comprehensive criminal justice re-entry services which include substance abuse services, academic programs, vocational programs, case management, chaplaincy and other program services to a medium to high-risk inmate population" at the Baker and Everglades Re-Entry Centers. Under the ITN, prospective vendors could submit proposals for one or both Re-Entry Centers; however, separate replies would be required for each.

3. On July 10, 2014, DOC issued Addendum #1 to the ITN which made changes to the original specifications in the ITN in response to some vendor inquiries. For example, in response to a vendor inquiry about the mental health classifications of inmates, the following information was contained in the Addendum:

Question #77: Will there be any inmates placed at the Everglades or Baker Re-Entry Centers with mental health psych grades? If so, is there going to be any mental health personnel on-site at either facility?

Answer #77: The Department will house Psych Grade 1*, 2*, at the Baker Re-Entry Center and 1*, 2*, and 3* at the Everglades Re-Entry Center, however 3*s will be housed on a limited basis. Mental Health Services will

be provided by Corizon, Inc. at Baker Re-Entry Center and [by] Wexford Health Sources at Everglades Re-Entry Center. These services, which will be under the direction of a licensed psychologist, may be provided on site, or at the parent institution.

4. The Department utilizes a 1-to-5 scale to measure the level of mental illness an inmate is demonstrating to determine what kind of personnel is required to manage the inmate. Psych grade 3 (called "S3") is the highest grade of mental illness where the inmate does not have to be separated from the general population. S3 inmates are generally those who have been prescribed psychotropic medications.

5. The rationale behind DOC's response to question #77 was explained by Kim Riley, DOC Director of Re-Entry, who said,

Because Everglades CI, which is the parent facility for Everglades Re-Entry Center, there had been some discussion about the possibility of allowing S3 inmates, those inmates who take psychotropic medication, to participate in the Re-Entry programming rather than denying them admission at the Everglades Re-Entry Center. So because of that discussion, we noticed in this ITN that they could possibly be placed on a limited basis at Everglades Re-Entry Center.

6. Bridges is a Florida corporation, established in 1980. Over the past 34 years, Bridges has managed over 125 contracts with the Department.

7. CEC is a Florida corporation that has been providing correctional treatment and re-entry services for over 18 years to

criminal justice populations, employs more than 3,500 individuals, and has serviced more than 210,000 incarcerated persons.

8. On or about July 23, Replies to the ITN were submitted by Bridges; CEC; Geo Re-Entry Services, LLC; Bridge for Hope; The Transition House; and the Village South, Inc., for the Everglades contract. Bridges and Geo also submitted Replies to the Baker ITN.

9. The Department designated Kelly Wright as the procurement manager for this ITN. Ms. Wright opened all the timely-filed Replies to the ITN. She determined that each Reply contained the "Mandatory Documentations" identified in section 4.22.2 of the ITN, e.g., the information cost sheet, price sheet, and attestations. She then forwarded the Replies to a group of five "evaluators" for further review. Each of the evaluators was experienced in the review process. They were provided a manual and training by Ms. Wright to help focus their reviews of the Replies.

10. The manual directed evaluators to develop negotiation points and prepare negotiation topic sheets for each vendor's Reply as a guide for the negotiation team. Evaluators who were also going to serve as negotiators were instructed to retain their copies of the vendors' Replies for use in negotiations.

11. The evaluators individually scored each Reply using the scoring criteria set forth in revised Attachment 7 of the ITN. As they reviewed the Replies, some of the evaluators also prepared negotiation topic sheets for use during the upcoming negotiation phase. Upon completion of their review, the evaluators scored the Replies as follows:

Bridges	845.55
Geo Re-Entry Services	803.60
CEC	767.00
The Village South	714.38
Transition House	695.38
Bridge for Hope	68.57

12. The scores were presented to Ms. Wright, who forwarded them to Patrick Mahoney, DOC's bureau chief of Transition and Substance Abuse Treatment Services. Mr. Mahoney served as the lead negotiator in this ITN process as well. He reviewed the scores and decided the Department would negotiate with Bridges, Geo, and CEC as the three proposals with the highest scores.

13. The Department then scheduled negotiation sessions with each of those vendors. In addition to Mahoney, two other negotiators (James Freeman and Dan Eberlein, both of whom had served as evaluators) took part in the process. The negotiation sessions were held on August 14-15. Rosalyn Ingram, the DOC Bureau Chief over Procurement, acted as the Department of Management Services certified negotiator facilitating the negotiation process.

14. Meanwhile, on or about August 20, a newspaper article was published in the *Miami Herald* which discussed possible inmate populations at Baker and Everglades. The article seemed to infer that all inmates at the Re-Entry Centers would be inmates with significant mental health issues.

15. When DOC personnel reviewed the *Miami Herald* article, the Department's initial perception was that the mental health issue may substantially affect the ITN as posted. If the entire Everglades facility had been changed to a mental health facility, that fact could change the ITN specifications. Exactly how it would change was not certain, as no re-entry center with all mental health inmates exists. The Department decided to reopen the negotiation process for both Baker and Everglades to address any possible changes to the ITN caused by the change in inmate population.

16. A telephonic negotiation session was noticed and then held on September 4 between the Department and each of three vendors: Bridges, CEC, and Geo. The negotiation session for Bridges was opened by Kelly Wright who stated, "This is . . . a negotiation meeting for comprehensive re-entry services at Everglades and Baker Re-Entry Centers." Bridges (represented at the session by its CEO, Lori Constantino-Brown), was asked if it had a plan to handle S3 inmates and Bridges replied in the affirmative.

17. On September 5, after conclusion of all negotiation sessions, the Department issued Requests for Best and Final Offer (RBAFO) to Bridges, Geo, and CEC concerning their interest in offering contracts for the Everglades Re-Entry Center. An RBAFO is sent only to vendors which the Department believes can adequately and efficiently meet the requirements of the ITN. Each of the vendors submitted their Best and Final Offer (BAFO) on September 11.

18. After review of the BAFOs from all vendors, the Department chose to award the contract to CEC despite Bridges having a slightly lower per diem rate than CEC (\$14.65 versus \$14.58). Upon review of all proposed services, the Department felt like CEC was providing significantly more for the proposed budget than Bridges could provide. Bridges timely filed a formal written protest and petition for formal administrative hearing, resulting in the instant proceeding.

19. The BAFOs were independently reviewed by each of the negotiators. They used the selection criteria set forth in the ITN, specifically:

- a. Experience in similar delivery of criminal justice services;
- b. Staffing quality and schedules;
- c. Quality and flexibility of Programming; and
- d. Cost.

20. The negotiators ultimately decided that the proposal by CEC should be approved. Mr. Mahoney preferred CEC's description

of Unit Management over its competitor's descriptions.

Mr. Freeman concurred, finding that CEC's proposal provided the best value to the State, especially in light of CEC's value-added services, i.e., those services which would be provided outside the stated contract price. Mr. Eberlein saw CEC's proposal as being more flexible in its programming. Each of the evaluators' preferences is warranted based on the evidence presented.

21. Despite being directed to retain their copies of the vendors' Replies for use in the negotiations, neither Freeman nor Eberlein did so. However, each of them had familiarized themselves with the Replies and applied the elements of the Replies to their final review during negotiations.

22. The process for this particular ITN admittedly had some unusual but unforeseeable issues. Generally, once the Department has decided which vendors to negotiate with, it will close the process from further review. And that did in fact occur in this case. However, the publication of the article in the *Miami Herald* caused an anomalous blip in procedures. Personnel within the Department at first believed that the article was correct, i.e., that all inmates to be processed through the Baker and Everglades Re-Entry Centers would be suffering from significant mental illness. If so, that would be considered a "game changer" for the ITN, requiring amendment or rescission of the ITN.

23. The article was not entirely correct. In fact, while there would be inmates at each of the centers with some level of mental illness, those would be limited to no more than 50 inmates. The Everglades contract already presupposed some level S3 inmates, those who were taking psychotropic drugs, so there was little change to the ITN specifications for that facility.

24. At any rate, the Department decided to reopen negotiations in order to allow the interested vendors to address the S3 inmate issue. The Department had further negotiation sessions with the vendors for Everglades on September 4. The vendors were asked how they intended to handle the S3 inmates.

25. As a result of the negotiation sessions, the Department requested BAFOs from the three vendors for the Everglades facility contract. Each vendor timely submitted a BAFO for consideration by the Department.

26. Bridges maintains that CEC's Reply to the ITN was not responsive because the Reply only included staffing for activities Monday through Friday rather than for seven days a week. DOC saw that omission as nothing more than a clerical error because the Reply, when considered as a whole, obviously contemplated staffing for seven days per week. The omission of a staffing schedule for Saturday and Sunday is not dispositive of CEC's Reply. There are numerous references in the Reply indicating CEC's intention to provide services seven days per

week. The omitted staffing schedule does not rise to level of being "non-responsive to the ITN."

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1) and (3), Fla. Stat. Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2014 version. The Administrative Procedure Act provides the exclusive remedy for resolving disputes arising from a competitive procurement by a state agency. State, Dept. of Lottery v. Gtech Corp., 816 So. 2d 648, 651 (Fla. 1st DCA 1999).

28. An invitation to negotiate is governed by the provisions of section 287.057(1)(c), Florida Statutes, which provides in pertinent part: "After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria." Best value is defined as "the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design and workmanship." § 287.012(4), Fla. Stat.

29. The burden of proof in this proceeding lies with the Petitioner who, as the party opposing the Department's decision, must show "a ground for invalidating the award." State

Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998); § 120.57(3)(f), Fla. Stat. The underlying findings of fact in this case are to be determined using the preponderance of the evidence standard. See § 120.57(1)(j), Fla. Stat.

30. This is a de novo proceeding, a form of intra-agency review. The object of the proceeding is to evaluate the action taken by the agency at the time it took the action. State Contracting and Eng'g, supra, at 609. A de novo proceeding in a procurement case means a proceeding in which evidence is received, factual disputes are settled, legal conclusions are made, and prior agency action is reviewed for correctness. The Administrative Law Judge does not sit as a substitute for the Department in determining whether the right party prevailed in the proceeding. "Instead, the hearing officer sits in a review capacity and must determine whether the bid review criteria . . . have been satisfied." Intercontinental Properties, Inc. v. State Dep't of Health and Rehab. Serv., 606 So. 2d 380, 386 (Fla. 1st DCA 1992).

31. The standard of proof used to make such a determinations is "whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." § 120.57(3)(f), Fla. Stat. The definition of standard of proof for purposes of procurement actions is considered to be akin to a

standard of review. R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID, ¶ 76 (DOAH Feb. 4, 2002; Miami-Dade Sch. Bd. Mar. 2002).

32. The Florida Legislature expressly recognizes that "fair and open competition is a basic tenant of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically." § 287.001, Fla. Stat.

33. The objectives that the State seeks in having competitive procurements are the following:

[T]o 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 various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2nd DCA 1997) (quoting Webster v. Belote, 138 So. 721, 723-24 (Fla. 1931)).

34. In the instant case, in order for Bridges to prevail it must identify and prove, by the greater weight of the evidence, an instance or instances where the agency's conduct in taking its proposed action was either:

- (a) Contrary to the Department's statutes;
- (b) Contrary to the Department's rules or policies; or
- (c) Contrary to the ITN specifications.

It is not sufficient for Bridges to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of review, Bridges must also establish that the Department's misstep was:

- (a) Clearly erroneous;
- (b) Contrary to competition; or
- (c) Arbitrary or capricious.

R.N. Expertise, ¶ 78.

35. In order to be clearly erroneous, the decision at issue must--even if there is evidence to support it--be shown by the complete record to strongly suggest that a mistake has been committed. U.S. v. U.S. Gypsum Co., 33 U.S. 364, 395 (1948); see also Floridian Constr. & Dev. Co. v. Dep't of Env't. Reg., Case No. 09-858BID, p. 24 at ¶ 48 (Fla. DOAH May 1, 2009; Fla. DER June 1, 2009). No such evidence exists in the present case. The evaluators' failure to retain copies of the Replies was erroneous, but minor in nature and overcome by the fact that the information in the Replies was nonetheless considered.

36. It has been generally stated that the "contrary to competition" standard is equivalent to the standard set out in Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931), that prohibits interference with the objectives of competitive bidding. See

also Cushman & Wakefield of Fla., Inc. v. Dep't of Mgt. Servs., 2014 WL 309246, p. 18, Case Nos. 13-3894BID and 13-3895BID, at ¶ 93 (Fla. DOAH, Jan. 24, 2014; Fla. DMS Feb. 5, 2014). In this case, DOC went out of its way to allow competition between all potentially approvable vendors, including Bridges, taking the extraordinary step of reopening negotiations.

37. An arbitrary decision has been described as one not supported by facts or logic, or is despotic. Agric. Chem. Co. v State Dep't of Env't. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). The decision in this case was supported by the facts and by logic.

38. Bridges also alleges that "DOC failed to perform an objective comparison of deliverables offered by vendors in their replies utilizing the selection criteria." Again, the evidence does not bear this out. It is clear the Department's evaluators and negotiators fully and carefully reviewed each vendor's proposal and made a decision based upon the stated criteria. That the negotiators did not compile an item-by-item comparison does not invalidate their review. It was undertaken in accordance with all applicable policies and principles.

39. Finally, Bridges alleges that DOC "impermissibly altered the specifications of the ITN by requiring vendors to serve an additional population of inmates classified as having a significant mental illness (S3 inmates) without issuing an

addendum. The Department clearly explained the S3 inmate issue and provided plausible and reasonable explanations for how the erroneously interpreted media release affected the ITN. The effect was essentially nil. And even Bridges stated that its proposal as submitted could accommodate the small number of S3 inmates.

40. There is, therefore, no basis for overturning the Department's determination that CEC is the best and appropriate vendor in lieu of Bridges' proposal.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Corrections upholding its award of the contract for services at the Everglades Re-Entry Center to Community Education Centers, Inc.

DONE AND ENTERED this 31st day of December, 2014, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
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this 31st day of December, 2014.

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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.